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IN THE

Supreme Court of the United States

October Term, 1968

No. 1280

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Petitioner,

against

JOHN T. DEEGAN, as Warden of Sing Sing Prison,
State of New York,
Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON C. WEISMAN
O. JOHN ROGGE
1501 Broadway
New York, New York 10036
Attorneys for Petitioner

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PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Mark Fein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the office of the clerk of that court on March 24, 1969.

Opinions Below

The United States Court of Appeals for the Second Circuit rendered majority and concurring opinions. The majority opinion was by District Judge John R. Bartels of the Eastern District of New York, sitting by designation.

It is reproduced as Appendix I, *infra,* pp. 1a-21a. The concurring opinion was by Circuit Judge Sterry I. Waterman. This opinion is reproduced as Appendix II, *infra;* pp. 22a-23a. These opinions are not yet reported.

The United States Court of Appeals for the Second Circuit affirmed an opinion and order of October 13, 1967, of District Judge Edmund L. Palmieri of and for the United States District Court for the Southern District of New York, denying the petitioner's request for a writ of habeas corpus. Judge Palmieri's opinion and order are reproduced as Appendix III, *infra,* pp. 24a-36a. This opinion was not reported.

Subsequently, and on December 1, 1967, Judge Palmieri granted petitioner's motion for a certificate of probable cause. Judge Palmieri's opinion and order of December 1, 1967 are reproduced as Appendix IV, *infra,* pp. 37a-38a. Judge Palmieri's opinion and order of December 1, 1967 were not reported.

Prior to the petitioner's instant habeas corpus proceedings in the federal courts, there were proceedings in the state courts, and an appeal to this Court which was dismissed for want of jurisdiction.

The New York Court of Appeals rendered majority and minority opinions. The majority opinion was by Judge Kenneth B. Keating. It is reproduced as Appendix V, *infra,* pp. 39a-50a. The dissenting opinion was by Judge, now Chief Judge, Stanley H. Fuld. Judge Fuld's opinion is reproduced as Appendix VI, *infra,* pp. 51a-52a. These opinions are reported. *People* v. *Fein,* 18 N.Y. 2d 162, 272 N.Y.S. 2d 753, 219 N.E. 2d 274 (1966).

The New York Court of Appeals amended its remittitur of July 7, 1966 twice. The first amended remittitur was pursuant to an order dated September 22, 1966. It is reproduced as Appendix VII, *infra,* pp. 53a-55a. It is reported. *People* v. *Fein,* 18 N.Y. 2d 722, 274 N.Y.S. 2d 159 (1966).

The second amended remittitur was pursuant to an order dated February 21, 1967. It is reproduced as Appendix VIII, *infra,* pp. 56a-58a. It is likewise reported. *People* v. *Fein,* 19 N.Y. 2d 691, 278 N.Y.S. 2d 880 (1967).

This Court denied review. *Fein* v. *New York,* 385 U.S. 649 (1967). Mr. Justice Douglas was of the opinion that probable jurisdiction should be noted. This Court also denied a petition for rehearing. *Fein* v. *New York,* 386 U.S. 978 (1967). These denials are reproduced as Appendix IX, *infra,* p. 59a.

The New York Court of Appeals, Judge, later Chief Judge Fuld, dissenting, affirmed the Appellate Division, First Department, which rendered a written opinion that is reproduced as Appendix X, *infra,* pp. 60a-74a. It is reported. *People* v. *Fein,* 24 A.D. 2d 32, 263 N.Y.S. 2d 629 (1965).

The Appellate Division, First Department, in turn affirmed the Supreme Court, New York County, Justice Gerald T. Culkin presiding. He rendered a written opinion denying the petitioner's motion for a new trial, which is reproduced as Appendix XI, *infra,* pp. 75a-85a. It was not reported.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on March 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did the prosecution's suppression of exculpatory evidence violate the due process clause of the Fourteenth Amendment?

2. Did the denial of pre-trial discovery and inspection of the bullets found in the decedent violate the due process clause of the Fourteenth Amendment?

3. Did the admission into evidence over objection and without a hearing of a chair obtained as a result of an illegal search and seizure violate the Fourth and Fourteenth Amendments?

4. Did New York's blue ribbon jury statute, under which the instant case was tried, violate the Sixth and Fourteenth Amendments?

5. Did the trial judge's statements to the jury violate the petitioner's right of silence under the Fifth and Fourteenth Amendments?

6. Did prejudicial publicity, emanating from the police and the prosecution, violate the due process clause of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *.

Fourteenth Amendment

Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Former Section 749-aa of the New York Judiciary Law

(Printed in Appendix XIII, pp. 108a-115a.)

Section 813-d3 of the New York Code of Criminal Procedure

(Printed in Appendix XIII, pp. 115a.)

Statement of the Case

A. Six Constitutional Violations

The petitioner is in custody on a second degree murder conviction with a sentence of 30 years to life, which is unlawful for an even half dozen substantial and fundamental federal constitutional reasons. The petitioner urged all six grounds in the state courts, unsuccessfully. Taken singly, each of the six grounds is sufficient by itself to require a reversal of the petitioner's judgment of conviction. Taken together, the six grounds present a case study of the way in which a prosecution ought not to be conducted.

This Court under the due process clause of the Fourteenth Amendment has given our country a uniform system of criminal justice, measured, with the exception of indictment by grand jury, by the relevant specifics of the federal Bill of Rights. These relevant specifics are as fully applicable to defendants in state criminal cases as they are to defendants in federal criminal cases. Moreover, the constitutional rights of defendants in state criminal cases are measured by the same constitutional standards and yardsticks as the constitutional rights of defendants in federal criminal cases. See, *e.g.*, *Ker* v. *California,* 374 U. S. 23 (1963) (Fourth Amendment); *Molloy* v. *Hogan,* 378 U. S. 1 (1964) (Fifth Amendment privilege against self-incrimination); *Griffin* v. *California,* 380 U. S. 609 (1965) (*ibid.*); *Smith* v. *Illinois,* 390 U. S. 129 (1968) (Sixth Amendment right of confrontation); *Barber* v. *Page,* 390 U. S. 719 (1968) (*ibid.*); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968) (Sixth Amendment right to trial by jury). See

generally, Rogge, *A Technique for Change,* 11 U.C.L.A. Rev. 481, 500-15 (1964), citing cases.

Whether one takes the "absorption" process reasoning of Justice Cardozo in the Court's opinion in *Palko* v. *Connecticut,* 302 U. S. 319 (1937), or the "incorporation theory" of Mr. Justice Black in his dissent in *Adamson* v. *California,* 332 U. S. 46, 68 (1947), or the more recent "selective incorporation" approach, one will arrive at the conclusion that the Court in its course of protecting the individual has reached the point where all the relevant specifics of the first eight amendments to the federal Constitution, with the single exception of indictment by grand jury, are fully applicable to defendants in state criminal cases under the due process clause of the Fourteenth Amendment. Mr. Justice Black, who still prefers his total incorporation theory, said nearly this in the last sentence of his concurring opinion in *Duncan* v. *Louisiana,* 391 U.S. 145, 171 (1968), in which Mr. Justice Douglas joined: "And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States."

Measured by the constitutional yardsticks of the due process clause of the Fourteenth Amendment and of the relevant specifics of the federal Bill of Rights, the petitioner's prosecution violates these constitutional provisions in these six particulars:

(I) The suppression of exculpatory evidence;

(II) The denial of pretrial discovery;

(III) The admission into evidence of illegally seized material;

(IV) The use of the blue ribbon jury;

(V) The trial judge's statements to the jury which violated the petitioner's right of silence; and

(VI) Prejudicial publicity.

I—The Suppression of Exculpatory Evidence

a. Theory of the Prosecution. The instant case illustrates that facts, no matter how stubborn, are sometimes no match for a stubborn theory. Once the prosecution had settled on its theory, facts pointing to the contrary were ignored and even suppressed.

The prosecution's theory was that Mark Fein shot and killed Rubin Markowitz, a bookmaker, sometime after 4:00 P.M. on October 10, 1963, in apartment 5B at 406 East 63rd Street, which the petitioner rented under the name of "Weissman" (79-80, 1136).* After the shooting, the petitioner allegedly tied decedent's legs with a rope and placed his 180-pound body in a black steamer trunk (1137, 1140, 242, 146).

The only testimony that the petitioner shot Markowitz, or that the decedent's body, or any body, was in the trunk, came from a prostitute, one Carmela Donofrio Lazarus, whom the Appellate Division termed "a woman with an

* References are to the record in the state courts; the pagination is that on the bottom of the pages, except for the "B" pages.

extraordinary number of aliases'' (App. X, p. 67a). During the trial she was usually referred to as Gloria Kendall, or Kendal, except that the prosecutor called her Mrs. Lazarus. She was a madam and a procuress as well as a prostitute, and had a string of call girls. The Appellate Division described her as ''a completely amoral person who could well merit the defense's description as a depraved character'' (App. X, p. 72a).

Lazarus was the name of her second husband. He had been convicted of larceny and also arrested for assault with a pistol (1607, 1611-12, 1679). His uncle was Richard Schlesinger, an ex-convict who, according to a police report, was ''engaged in armed robberies of bookmakers'' (1687-88). Her ex-husband, Blaustein, had been convicted of grand larceny and extortion and arrested for involvement in a murder case. Lazarus, whose existence and relationship to Gloria were at all times concealed, remained in hiding until after the petitioner's indictment (1612, 1633).

In February 1964, after having spent a month fleeing from the police, Gloria returned from Canada and asked the petitioner to meet her; but he refused and sent an investigator, William J. Whelan, employed by his counsel (1886-87, 1184-85). Gloria admitted on cross-examination that she met Mr. Whelan on February 11, 1964 and asked him for money but he refused (1379). The blackmail nature of this demand was established by Whelan's testimony at the trial, that, upon his refusal, she threatened that ''if it ever comes to a showdown I am going to protect the ones that are dearest to me, not Mark Fein'' (1891). Those were Lazarus, Schlesinger and Blaustein.

Eight days later she visited the police and informed against the petitioner, and they, within two hours, arrested him on the charge of murdering Markowitz (1187-88, 1516-17, 1526). They did so solely upon the statement of this woman, whom they had during the preceding two months been actively investigating as the possible murderer. Now they immediately accepted her accusations at their face value (1612, 1685).

Gloria's story was that shortly after 5:00 P.M. on October 10, 1963 the petitioner telephoned her and urgently requested her to come to the Weissman apartment. Although admittedly she had not seen or heard from him for over 10 days, she nevertheless responded immediately to his call for help (1331-32). When she arrived, petitioner, so she says, showed her a trunk and said he had shot Markowitz, whose body was in the trunk (1135-40).

The way Gloria contrived her story, she had herself ask the petitioner whether he was sure that the man in the trunk was dead. Thereupon, so she says, the petitioner lifted the trunk lid, and she "saw part of an arm, and some new clothesline, and some white material that looked like a shirt" (1140).

Gloria offered to help the petitioner remove the trunk from the apartment, but petitioner insisted that she call some of her friends also (1138-39). She telephoned David Broudy, whom petitioner had never met, at his home in the Bronx (1139, 875, 881). Broudy, an unemployed taxicab driver and hairdresser, who had been discharged from the Army because of extreme character and emotional disorders rendering him unfit for service in any capacity,

responded at once to Gloria's request, although he was then in bed taking an afternoon nap (881, 75B).

A second friend of Gloria's, Geraldine Boxer, known as Geri to her friends, also appeared at the Weissman apartment. At the trial, Geri and Gloria testified that when Gloria left her apartment to go to the defendant's aid, she left a message for Geri, whom she expected to call for her, with one Sandra Ede. In it she asked Geri to meet her at the Weissman apartment, and Geri testified that Sandra gave her the message on the building intercom (706-08).

According to the prosecution, the defendant and Gloria obtained a station wagon, and Broudy and the defendant loaded the trunk into it (902). Gloria then urged the petitioner to go home, so that he could attend a dinner date with his wife and some friends (1148-49). After the petitioner left, Gloria, Broudy and Geri drove to Gloria's own apartment on 73rd Street, and double parked the station wagon in front of that building (732, 904-05, 1152). Broudy and Geri remained in the station wagon while Gloria went up to her apartment, where she remained for a period of time which Broudy and Geri Boxer estimated as between one-half to three-quarters of an hour but Gloria herself estimated as between 10 to 25 minutes (791, 905, 1370).

After Gloria rejoined the group, Broudy drove the station wagon on a long, circuitous journey on the parkways about the city (907-08), finally stopping at 179th Street on the Harlem River Drive; and then they lifted the trunk over the retaining wall and threw it into the river (908). A month later, on the morning of November 8, 1963, the decedent's body was found floating in the river about three

miles away from where the trunk had been thrown in, without any sign or trace of a trunk. No such trunk was ever found. Nor was there ever any plausible explanation how the body separated from the trunk. The prosecution's case that the petitioner admitted the killing turned solely on Gloria's story.

Petitioner did not testify at the trial. In an affidavit which he subsequently submitted he stated that on October 10, 1963 he had received a telephone call from Gloria summoning him to the Weissman apartment; that when he arrived, Gloria told him Markowitz had been murdered and demanded his assistance in the removal of the trunk, threatening that otherwise he would become involved and his association with Gloria would be exposed to petitioner's wife, his family and others; that, panic-stricken, petitioner had acceded to Gloria's demands and agreed to assist her; that Gloria later continued to threaten him and attempted to extort money from him; and that it was now clear to him that there had been no body in the trunk but that this had been told to him to set him up later for a blackmail scheme (179B-182B).

At the trial the prosecutor, after concluding Gloria's direct examination, stated, with a deceptive display of candor, that Gloria had twice recanted her story in his presence—first on June 30, 1964, and, more importantly, on September 28, 1964 (1201-1204). But the prosecutor did not disclose the critical circumstances which gave the second recantation its real significance. Nor did he make any effort to correct the incomplete and thus misleading testimony of Gloria and of his own investigator, Detective James Leman, which carefully omitted the same critical

circumstances. These circumstances involve Mrs. Dagmar Ingeborg Finch Generazio, whom the prosecution successfully edited out of the case. Even District Judge Bartels conceded: "The prosecutor advised defense counsel of both recantations but not of the confrontation with Dagmar prior to the recantation." (App. I, p. 11a.)

It was a confrontation between Dagmar and Gloria in the prosecutor's office on September 28, 1964 that led to Gloria's second recantation. Without Gloria's story about the petitioner's confession to her of murder, there was no case against Mark Fein, as the prosecutor himself admitted:

> Q. * * * so that on that day, as matters stood at that time, the prosecution had no case against Mark Fein, right? A. That's right (3494-95)

The prosecution, in order to hang on to its stubborn theory that Mark Fein killed Markowitz, had to suppress Dagmar and the testimony she could give. In an excess of zeal, the prosecution did just this.

b. Mrs. Dagmar Ingeborg Finch Generazio. At a new trial hearing, Dagmar testified that on October 10, 1963, the last day that the decedent was seen alive, she was living at the apartment of Marsha Gail Weiner Tracy, usually called Gail, on East 64th Street; and, between 3:00 and 4:00 P.M., received a telephone call there from Gloria. Gloria told her that she was nearby and had a heavy box to move; and she asked Dagmar, without avail, whether Dagmar could borrow Gail's car, or any other car for her (2547-51). Dagmar also testified that before the trial she had told this to Detectives Leman and Frank Lyons, who were assigned to the case (2559-67), as well as to the prosecutor, Mr.

Vincent J. Dermody (2570-72). She further testified that they kept telling her she must be wrong as to the time of the phone call, that it must have been later (2567, 2585-86, 2592, 2593).

However, Dagmar testified that she was able to fix the time of the call at between 3:00 and 4:00 P.M. because she recalled that it was light outside when the call came; because Gail, who usually went out between 5:00 and 5:30 P.M. was still in the apartment when the call came; and because Dagmar also remembered watching the Early Show on television some time after the call came, and that program started at 5:00 P.M. (2551-52).

Gail corroborated Dagmar's testimony about the call and the fact that it came between 3:00 and 4:00 P.M. She fixed the time of the call by reference to the fact that it came shortly after she had taken her afternoon pill, which she regularly took at 3:00 P.M. for her epilepsy (3599-3600).

On May 8, 1965, 8 days after her court appearance, Gail, in a suicide note addressed to "Whom It May Concern", wrote:

> I'm writing this because I know a man's life is at stake—and I know I shall be dead soon—
>
> For my last words I again want to say I am sorry to Mark Fein and his family—all of which I do not know and never have met * * * but Dee did receive the phone call from a gal named Gloria on October 10th, 1963 a few minutes after I took my 3 o'clock medicine. This statement I add to my sworn affidavit and my sworn testimony in Supreme Court.

Please forgive me for hiding this evidence by my constant denials of any knowledge of this call to Mr. Dermody—but I could only think of my parents—and my husband & then of the baby which I lost anyway. I hope my testimony has helped clear things up.

I'm not strong enough to face any more pressures & embarrassment which this Mark Fein case has brought to me—I wanted so much to live, but the thought of facing people & maybe another trial is more than I can bear.

Marsha Gail Weiner Tracy

Please just don't hurt my family & husband any more. That's all I ask and pray for (481B-483B).

The next day she did attempt suicide by taking an overdose of barbiturates; but she was taken to Bellevue Hospital and her life was saved.

Dagmar's husband Sergeant Russell James Generazio, who was present when Detectives Leman and Lyons interviewed her at their home in New Jersey, confirmed the fact that Dagmar told the detectives that she received the call in the afternoon between 3:00 and 4:00 P.M. (2469-76).

In addition, Dagmar testified that in November 1963 and again in January 1964 Gloria came to see her, pleaded with her to "stick with her", and promised her that she would receive something valuable if she did (2552-54); and that she told the prosecutor and the detectives about these conversations as well (2588-89). Detective Lyons had even asked Dagmar if Gloria had been trying to "bribe" her (2588-89).

Detectives Leman and Lyons interviewed Dagmar at length at her home in Red Bank, New Jersey late in Sep-

tember 1964 (2299-2307, 2368-73). Thereafter she was interviewed in the District Attorney's office on four or five occasions (2311-19), and on at least three of them she was interviewed by the prosecutor himself (3354-60). In addition, Detectives Leman and Lyons were in telephone communication with Dagmar on an almost day-to-day basis during October 1964, the month the trial began. Detective Leman admitted to having had ten telephone conversations with her during that month, of which five or six were placed by him from the District Attorney's office pursuant to the prosecutor's instructions, and Leman said he did not know how many additional times Detective Lyons had talked to her (2319-21, 2324, 2438-39). He also admitted that the detectives discussed with her whether anyone representing the petitioner had been in touch with her, that they told her to advise them if anyone did, and that each time she always told them no one on behalf of petitioner had been in touch with her (2321-24).

At the new trial hearing, both the prosecutor and Detective Leman acknowledged that Dagmar had told them about Gloria's telephone call to her. Nor did they deny that Dagmar had reported to them Gloria's two subsequent requests to "stick with her". They differed only as to the time of the call: they testified she had told them the call was later, between about 6 and 7 p.m., instead of between about 3 and 4 p.m. (2371-72, 2376-78, 2430-31, 2451, 3349, 3352-53, 3357-62).

But whatever the hour of the call, the suppression of Dagmar and her testimony violated due process. If Gloria made her call between 3 and 4 p.m., then she was an accomplice; for the decedent had been alive shortly after 4:00

p.m. (278-80), and here was Gloria making plans to dispose of the body before the murder had occurred. Moreover, since 3 to 4 p.m. was considerably earlier than the time (after 5 p.m.) when Gloria claimed the petitioner summoned her to the Weissman apartment, this would have demolished the prosecution's case as Gloria presented it.

Also, if Gloria's call to Dagmar on October 10, 1963 was between 3 and 4 p.m., the suppressed evidence required the submission to the jury of the issue whether Gloria was an accomplice, in which event Section 399 of the New York Code of Criminal Procedure required that her testimony be corroborated. The defense requested such an instruction (2267-68); but it was refused by the trial judge on the ground that there was no evidence that Gloria was an accomplice.

However, even accepting the prosecution's version that the stated time of the call was between 6 and 7 p.m., the prosecution's failure to disclose it was still highly prejudicial to petitioner. First, such disclosure would have gravely impaired Gloria's credibility with respect to the specific events of the day on which the decedent was last seen alive, as well as her general credibility. Second, Gloria testified that at this very time (between 6 and 7 p.m.), while she, Broudy and Geri were driving in the station wagon with the trunk in it, she went upstairs to her own apartment and spent a substantial amount of time there, while her friends waited outside (1370, see also 791, 905). Had the prosecution disclosed that it had evidence indicating that Gloria had at that time telephoned Dagmar in an attempt to borrow a car to remove a box, the jury might

well have inferred that the decedent's body was not in the trunk at all but was elsewhere awaiting removal, and that, therefore, the entire substance of Gloria's story was false.

It was on September 28, 1964, just three weeks to the day before the trial began, that there occurred in the prosecutor's office a dramatic confrontation between Gloria and Dagmar; and Gloria's second recantation. This is Dagmar's account of what happened after she told of Gloria's call to her on October 10, 1963 at Gail's apartment:

> Q. New tell us what happened, when you repeated the story. A. After I had finished, Gloria—Gloria kept interrupting, and she was told to "shut up", you know, so I could finish.
>
> After I had finished, Gloria jumps up, grabs the phone, and says, "I'm not going to listen to this. You're trying to pin this on me. I am not going to say anything or listen to this until I call my lawyer —until I speak to my lawyer."
>
> And Mr. Dermody grabbed the phone from her and said, "Well, listen, we're not going to call anybody." And he told her to shut up. And after a couple of minutes they took her out of the room.
>
> Q. Will you describe how she was behaving at the time. Was she screaming or yelling? A. She was screaming, I'd say, yelling. (2594-95)

The prosecution's own descriptions at the new trial hearing of the confrontation between Gloria and Dagmar on September 28, 1964 were equally vivid and revealing. Both Detective Leman and the prosecutor testified that when Dagmar finished, the prosecutor asked Gloria whether

this had happened. She called Dagmar "a goddam liar", got very angry and upset, exploded and "got very excitable," screamed hysterically and was told she was upsetting the whole building by her loud noises. Detective Leman took Dagmar out of the room, and Gloria said she wanted to call her lawyer (2377-78, 2326-28, 3362-63).

The extraordinary significance of this incident became apparent when the prosecutor on cross-examination disclosed, referring to Gloria:

> She then started to yell and scream and accuse, as I said yesterday, Detective Leman of getting people to say things that weren't true. And that's when she said that she wanted to speak to a lawyer. We calmed her down. She spoke with a lawyer. And then after Dagmar left the room with Detective Leman, she said to me that she would not testify; and, as a matter of fact, she went back to the story she had given us once before in the end of June that the defendant never told her that he had shot the deceased and she had seen the body in the trunk. (3496-97)

All of these events, except the bare fact of a recantation by Gloria on that date, the prosecution in an excess of zeal concealed from the defense. Both Gloria and Detective Leman in their trial testimony concealed the presence of Dagmar at the September 28, 1964 confrontation.

During Gloria's cross-examination, trial counsel asked her who was present when she saw Mr. Dermody on September 28, 1964. She responded:

> A. I think Detectives Lyons and Leman.
>
> Q. Anybody else? A. I don't remember anyone else. (1393)

Detective Leman likewise concealed Dagmar's presence at the September 28, 1964 meeting in the prosecutor's office. When trial counsel questioned him who was present he answered:

> A. There was Mr. Dermody and Detective Lyons, and, again, there was either Mr. McKeever or Mr. Reynolds was present. (1638)

Neither during his cross-examination nor during the prosecutor's redirect (1665-66) did Detective Leman make any reference whatsoever to the presence of Dagmar or to her confrontation and contradiction of Gloria. Like Gloria, he obliterated every trace of Dagmar from his testimony, thereby concealing not only her but also the whole purpose of the meeting.

The Appellate Division in effect admitted the inaccuracy of the testimony of Detective Leman as well as Gloria in omitting Dagmar from the September 28, 1964 meeting when it stated:

> * * * Technically speaking, this testimony was correct, because, at the time of recantation she was not present. But it was not an accurate statement as to those present at the interview. (App. X, p. 81a)

But the testimony was not even "technically" correct, despite the efforts of District Judge Bartels to make it appear so (App. I, p. 11a). Both Gloria and Detective Leman were testifying, not about the time of the recantation, but about the confrontation between Gloria and Dagmar, which immediately preceded it. Thus Gloria included Detective Leman among the persons present (1392-93). Since Leman was not present during the recantation itself

any more than Dagmar was (1393, 2328), they having left the room together (3497), Gloria was obviously testifying, and lying, about the time preceding her recantation, when Dagmar, as well as Detective Leman, were there. In Detective Leman's case, he could not possibly have referred to the recantation itself because he admittedly was not present when it occurred (1637-38, 3496-97). At the new trial hearing Detective Leman expressly acknowledged that he left the room with Dagmar and did not "know what happened after that" (2328). At the time when he and Gloria were present, so was Dagmar.

The respondent cannot possibly claim that the prosecution had forgotten about Dagmar. She was the whole occasion for the September 28, 1964 meeting. Detectives Leman and Lyons were in almost daily telephone communication with her during October 1964, the month the trial began. Most important of all, at the high point of the trial, on Friday, November 13, 1964, the District Attorney's office concededly made an extensive telephone call to Dagmar at her home in Red Bank, New Jersey (Telephone Company records 2747-49). This particular call demonstrates the prosecution's systematic course of suppressing exculpatory evidence; for this call was made on the very same day that Gloria gave some of her false testimony eliminating Dagmar from the September 28, 1964 meeting at the prosecutor's office (1323, 1392), and only two court days preceding Detective Leman's testimony on November 17 to the same effect (1558, 1637-38). Indeed, the call was made on the court day preceding Gloria's redirect examination on Monday, November 16 (1400), when the prosecutor again reverted to the September 28 meeting without in any way

bringing out the suppressed facts (1429-31). It is evident that the prosecution would have handled the matter very differently if the report from Dagmar had been to the effect that she had been located by the defense, so that the prosecution would have concluded that concealment was no longer safe.

Moreover, the prosecutor permitted Gloria not only to omit all reference to Dagmar; but also to conceal the fact that the reason for her recantation on September 28 was her confrontation with Dagmar. Instead, the prosecutor let her give as the reason for her second recantation: "The idea of coming here and saying these things that might hurt this man was against all my principles" (1429).

The prosecutor also let Detective Leman conceal the real reason for Gloria's second recantation, and on redirect examination at that. The prosecutor asked Leman to explain what happened at the time that Gloria had asked to phone her lawyer and had requested him to leave the room, and he replied:

> A. Well, she accused me of questioning friends of hers and being a—she accused me of being a Gestapo agent.
>
> Q. Is that the term she used? A. Yes.
>
> Q. And was it in that connection that she said she objected to you being present in the room? A. Yes. (1666)

But the prosecutor knew of Gloria's less altruistic motivation; his own account of this event under cross-examination at the new trial hearing was:

> She was mad at Leman. She accused Leman of trumping up this story, getting Dagmar to trump up this

> story about her; and out of spite to Leman, she told us she wouldn't testify and said that Fein never said it—(3507)

The prosecutor had to acknowledge at the new trial hearing that none of these facts had been disclosed either to the defense or to the court (3509-11).

It is also relevant to note that the petitioner's counsel made every effort to obtain Gloria's attendance at the new trial hearing so that she could be examined, for the first time, about the suppressed facts. Three subpoenas were issued, but Gloria could not be found (3233, 3235-36). The prosecutor stated to the court on April 19, 1965 that he did not have any idea as to Gloria's whereabouts (3233); but on April 20, 1965 he testified that he had talked to her on the telephone "about maybe three or four weeks ago" (3386-88). This would have been just about the time, March 26, 1965, when the trial judge had written both sides setting a date for the new hearing (524B-525B). The prosecutor, knowing of the imminence of the new trial hearing, which was largely concerned with events in which Gloria participated, could not so easily have lost track of her whereabouts. The District Attorney had been served with petitioner's motion papers, and the prosecutor was fully aware that Dagmar's testimony in contradiction to that of Gloria, was to play a cardinal part in the hearing. Concerning these circumstances, District Judge Bartels contributes this observation in his first footnote: "Gloria was not available for this hearing and there is no showing that she would be available for any other hearing." (App. I, p. 2a.)

Further implementing the planned obliteration of every trace of Dagmar, the prosecution, particularly through

Detective Leman, frustrated petitioner's chances of locating her. Shortly before the trial, defense investigator Whelan heard of a "grapevine rumor" about a girl named "Dee", who might have knowledge about the case, and diligently attempted to obtain information about her (2924-25, 2930). He ultimately learned, after the trial had commenced, of the name of Dagmar, and then of Dagmar Finch, and that there was a rumor that she had told the District Attorney's office that Gloria had called her in order to borrow a car (2915-25). However, both the investigator as well as defense counsel were utterly unaware that Dagmar had married, that her name was now Mrs. Russell James Generazio, and that she had moved to New Jersey (3004-09, 2911-16, 2925-27, 2931). During the trial, this defense investigator told Detective Leman about the rumor he had heard concerning Dagmar Finch, and asked Leman for her telephone number and address, so that the investigator could interview her (2914-16, 2918, 2928, 2930, 2936). Leman refused this request, stating: "I am not at liberty to give it to you" (2929-30, 2936). The prosecutor, moreover, admitted at the new trial hearing that he himself had "become aware that the defense was looking for Dagmar" (3442-43). Nevertheless, in his zeal he continued on his course of suppressing any facts which were contrary to what was now his stubborn theory that the petitioner had killed the decedent.

District Judge Bartels wrote that "defense counsel knew about Dagmar". (App. I, p. 12a.) It is true that defense counsel in cross-examining Geri Boxer referred to a Dagmar Finch; but all that he was trying to do was to find out the extent of Geri's association with Gloria's stable of call girls (765-66). The name had no

particular significance to him; and he never brought it up again, not even when he subsequently cross-examined Gloria. Moreover, Geri denied knowing any girl by that name, although she admitted that she had once met a girl named Dee (765-66).

Judge, now Chief Judge, Fuld stated the suppression point with reference to Dagmar in a nutshell in the first paragraph of his dissenting opinion:

> I am reluctant to vote for affirmance in this case in view of the conceded nondisclosure and concealment by the prosecution of evidence which, in my judgment, might well have persuaded the jurors to reach a different verdict. Although the defendant points to several such items, I direct myself to but one of them. The record reveals that a Mrs. Dagmar Generazio had given the prosecution information which was at odds with the trial testimony of the People's key witness, Gloria Kendal, and that such information had not been disclosed to the jury or to the defense. Such information suggested—or, at least, so the jury could have found—that Gloria, rather than the defendant, was responsible for the murder and thus had a compelling motive to accuse him of the crime. Since the case against the defendant admittedly depended on the testimony of Gloria, there is heightened significance in the fact, likewise not revealed, that Gloria had actually been confronted with this information, as well as by Mrs. Generazio herself, in the district attorney's office immediately before she recanted (for the second time) her story against the defendant. (App. VI, p. 56a)

Circuit Judge Waterman found Chief Judge Fuld's dissenting opinion "most persuasive"; but nevertheless con-

curred in District Judge Bartels' opinion on the erroneous ground that this was a state rather than a federal prosecution:

> I find the dissenting opinion of Chief Judge Fuld of the New York Court of Appeals, 18 N.Y. 2d 162, 177, 272 N.Y.S. 2d 753, 763 (1966), most persuasive. I, with him, believe that it is possible that the jury might have reached a different verdict if the testimony of Dagmar Generazio gave at the post-trial hearing had been presented at the trial. Nevertheless, I recognize that petitioner was convicted in the New York state courts and not as a result of a federal prosecution, and as we are not therefore writing upon a clean slate, I am willing to concur in the affirmance of the decision below. (App. II, p. 23a)

On the prosecution's suppression of Dagmar and her account, District Judge Bartels has this comment: "Mr. Blinder, one of the defendant's counsel, stated at the post-trial hearing that he did not pursue the matter because he believed that if Dagmar were important to the defendant's case, the prosecutor would inform him of that relevance" (App. I, p. 13a). But this comment compounds the unconstitutionality of the prosecution's suppression of exculpatory testimony.

What Mr. Blinder actually said, in answer to one of the prosecutor's questions on cross-examination, was this: "A. And we [defense counsel] had assumed that if she was a valuable defense witness, you [the prosecutor] would have given us her name, as you had the name of Sandra Ede" (3026).

Defense counsel did place reliance on the prosecutor; and the prosecutor spoon-fed defense counsel just enough information to preserve this reliance. But the prosecutor did not tell defense counsel what he did not want them to know. He did not tell them about Dagmar and her confrontation with Gloria; and this despite the fact that he knew "that the defense was looking for Dagmar." (3442-43)

In this connection, Mr. Blinder further testified that he did not know of Mrs. Generazio until he read Mr. Louis Nizer's motion for a new trial (3003). This was weeks after the trial was over. Mr. Blinder and his co-counsel, Mr. Kleinman instructed their investigator Mr. Whelan to see if he could find a witness described as D (3004-05). Mr. Whelan reported back to them from time to time on his efforts to locate the witness described as D; but he was never able to trace her (3005). If the prosecution's suppression of Dagmar and her confrontation with Gloria do not make out a due process violation, then it would be difficult to conceive of a suppression of exculpatory evidence which would.

c. Sandra Ede. The prosecution's zealous suppression of Dagmar and her exculpatory testimony was but one of a number of such instances. It was simply the most glaring of the lot. Another instance of suppression was that of Sandra Ede's exculpatory testimony.

Gloria testified that when she received the call from the petitioner on the afternoon of October 10, 1963, the last date the decedent was seen alive, Sandra was in Gloria's apartment (1133-34). Geri testified that when she went to

Gloria's apartment on that day to meet Gloria she was told by Sandra over the intercom to meet Gloria at the Weissman apartment, and that was the occasion for her going there (705-707, 783-86).

After the prosecutor rested his case, he furnished defense counsel with Sandra's name and address; but at the same time he represented to the defense that when Sandra had been interviewed at the District Attorney's office, she "claimed to have had no recollection of the events that allegedly transpired on October 10, 1963" (1747). He asserted that "it is for that reason that the People did not call her as a witness" (1747). In the light of this representation, the defense did not call her as a witness either.

The prosecutor's representation about Sandra's lack of knowledge was, to say the least, disingenuous. Although Sandra had said that she had no recollection one way or the other about the events of October 10, 1963, she had also said that she was not in Gloria's apartment on October 10, had never given messages on the intercom (3175-76), could not have given a message to Geri to meet Gloria at the Weissman apartment because its existence was then unknown to her (3151), and that on the afternoon in question she was in her own apartment to see to the installation of a telephone.

Shortly after her first interrogation in March 1964, Sandra was brought to the District Attorney's office where she repeated what she had stated before, and added that she was not even certain that she had been in Gloria's apartment at all on October 10. In October she had moved out of her mother's home in the Bronx and taken an

apartment of her own on Palisades Avenue in Riverdale. On one day in either the first or second week of the month she had had a telephone installed in her new apartment. She knew that on that day she had not gone to Gloria's apartment. The telephone installation had taken much longer than it ordinarily would because of equipment difficulties, and it was late in the afternoon by the time it was completed. She could not possibly have gotten to East 73rd Street by 5:30 p.m., although she did not know what date it had been.

Detectives checked with the New York Telephone Company and discovered that her telephone had been installed on October 10, 1963. Sandra was again called to the District Attorney's office and learned this fact from the prosecutor. She again insisted that the installation had taken place in the afternoon so she could not have been in Gloria's apartment at all on October 10. At the new trial hearing she testified:

> A. The only thing I can remember about October 10th is that I had a telephone put in.
>
> Q. You had a telephone call—a telephone installed? A. In my apartment.
>
> Q. In your apartment? A. Yes (3160)
>
> * * *
>
> Q. Well, in that connection can you tell us what time the installation was completely finished? A. No. But I know I had a lot of difficulty because they brought the wrong phone and the wrong extension, so it took much longer than it ordinarily would.
>
> Q. Yes. And as a result of this difficulty that you remembered, can you give us any idea what time the telephone man completed his work and left? A. Sometime late in the afternoon. I don't remember exactly. (3163)

The Appellate Division itself found, based on the evidence given at the new trial hearing by, among others, Detective Leman (2358-61, 2413-14, 2420-21):

> On the motion for a new trial it was established that the district attorney interviewed Miss Ede and she refused to testify. She stated that if called she would testify that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone. (App. X, p. 75a)

This information was highly material. It cast further doubt upon the testimony and credibility of Gloria. It also cast doubt upon Geri and her account as to how she came to meet Gloria at the Weissman apartment on October 10.

The significance of Sandra's statements to the prosecution is manifest. Since she was not in Gloria's apartment and did not give Geri any message to go to the Weissman apartment, Geri must have gone there pursuant to instructions received from Gloria earlier that afternoon. It follows that Gloria was planning to be at the Weissman apartment prior to and at the very time Markowitz was allegedly murdered. This squarely corroborates the statement in the petitioner's affidavit, that it was Gloria who called him to the Weissman apartment, not he who called her.

d. The Bennett-McNair Testimony. A third instance of suppression occurred with reference to the exculpatory testimony of Mrs. Bennett and Mrs. McNair. Mrs. Bennett, a 32-year-old widow, her mother Mrs. Vera McNair, and her 3-year-old daughter Constance were tenants of an

apartment at 406 East 63rd Street. In the words of the Appellate Division:

> * * * They occupied an apartment in the rear of the building, whereas the "Weissman" apartment was in the front. They were interviewed by the police and told them that on the afternoon of October 10 they heard pistol shots which they believed emanated from the alleyway beneath their windows and in the rear of the house. Concededly the defense also interviewed these ladies before the trial but it is claimed they never revealed this information. (App. X, p. 77a)

The apartment which the two women occupied was on the third floor in the rear of the building, while the alleged murder apartment was on the fifth floor in the front of the building (2826-27). Thus it would seem that the shots which these women heard could not have been fired there (2826-27). Nevertheless, the prosecution concededly did not disclose the statements of these women to the defense (3413).

When Mrs. Bennett and Mrs. McNair furnished their information to the police and the prosecution, they were told in effect to keep "their mouths shut about this" (3413, 2349, 2840, 3076). At the new trial hearing, Detective Leman confirmed this; and admitted as well that he considered the information which they gave him to be "important" (2348).

Also, at the new trial hearing one of the petitioner's attorneys, who had interviewed the two women prior to the trial, emphatically and repeatedly swore that they at no time told him that they had heard shots on the after-

noon of the murder (2992). This was in conformity with the testimony of the women that they had been warned by the authorities not to divulge this information to anyone (2840, 3076). Indeed, Detective Leman and the prosecutor both conceded that they had given the women such a warning (3413, 2349). Consequently, it was not until after the trial that Mrs. Bennett and Mrs. NcNair believed it permissible to tell the petitioner's new counsel, who were interviewing all of the tenants of the building, about the shots that they had heard coming from the direction exactly opposite to that of the Weissman apartment.

Mrs. Bennett and Mrs. McNair further told the authorities about a trunk they saw in the building about the time of the murder, and one of them testified that she inadvertently (and contrary to instructions she had received from the authorities) discussed the trunk with defense counsel (2960). She maintained, however, that she immediately realized she had violated instructions and refused to furnish any further information to counsel (2961).

e. Detective Kelly's Ballistics Report. A fourth instance of suppression occurred when the prosecution failed to make known to the defense, Detective James E. Kelly's ballistics report (150B). This report concluded that there was no evidence of any bullets in the Weissman apartment. That tended to show that the shooting did not occur there, an inference supported by the Bennett-McNair testimony as well as other evidence.

The New York Court of Appeals took the view that the Kelly report was "fully available to defendant" (App. V, p. 45a). The New York Court of Appeals was mistaken.

Although the defense did serve a general subpoena for reports, which brought them physically into the courtroom, it could not, under the procedure applied, demand or inspect one of these reports unless the defense specifically requested it, and the defense could not request the Kelly report precisely because the prosecution had not disclosed its existence. (Of course, the prosecutor did not put Detective Kelly on the stand.)

Each of the prosecution's suppressions and concealments, and sponsorship of false or misleading testimony, constituted a violation of the petitioner's constitutional rights. Cumulatively, their effect was even greater. All of the suppressed or withheld evidence would clearly have assisted the defense in probing into the basic facts. Even more importantly, it might have persuaded the jury (a) that Gloria's twice-recanted, crucial testimony against petioner was false, (b) that Gloria, not petitioner, committed the murder, or, at least, was directly implicated in it, (c) that arrangements for disposing of the body were being made by Gloria or others before petitioner allegedly committed the crime, (d) that the crime occurred elsewhere than in the Weissman apartment, or (e) that, in any event, a reasonable doubt existed as to petitioner's guilt.

II—The Denial of Pretrial Discovery

The prosecution compounded its suppression of exculpatory evidence by opposing, and defeating, defense counsel's effort to have a pretrial examination of the bullets found in the decedent. One can ask why in the name of fundamental fairness defense counsel should not have been able to inspect these bullets.

Four bullets were found in the body of the decedent. The defense made a timely motion for pretrial discovery and inspection of the bullets (31A-38A), which the prosecution opposed (7A, 42A), and the court denied (30A). At the trial the prosecution's ballistic witness, Detective Walter J. Haase, in testifying about the bullets that he had examined, stated that they came "from a firearm with a right six rifling" (266), thereby conveying to the jury the impression that all four bullets were shot from a single firearm. Having been denied all opportunity for its own expert to inspect the bullets before the trial, the defense was in no position to assess Haase's testimony or to cross-examine him adequately. The prejudice became apparent later when, in support of the motion for a new trial, petitioner was able to tender expert evidence that Haase's testimony had been "erroneous and misleading," in that only one of the four bullets could be identified as having been fired from a firearm with a "right six rifling" (271B-273B). The New York Court of Appeals nevertheless held (first amended remittitur, App. VII, p. 59a) that petitioner's constitutional rights were not violated.

III—The Admission Into Evidence of Illegally Seized Material

The prosecutor further compounded his suppression of exculpatory evidence and his successful efforts in defeating defense counsel's motion to have a pretrial examination of the bullets found in the decedent, by an equally successful effort in getting into evidence a chair (Ex. 54) which had been illegally seized. It is not disputed that the chair, which had been stored in a storage warehouse under the petition-

er's pseudonym Weissman, was seized by detectives without a search warrant, without anyone's consent, and over the protest of the warehouse manager (1536-38, 390B-393B).

When the prosecutor first sought to introduce the chair in evidence, defense counsel objected specifically on the ground of unlawful search and seizure and he also moved to suppress the evidence "and if necessary to hold a hearing" (588-89). The prosecutor unequivocally represented to the court and defense counsel (590) that "the arrangements to take the furniture, including this chair, out of the apartment were made by this Gloria Kendal at the defendant's request." The court itself confirmed this, sandbagging defense counsel in the jury's presence with this question and comment:

> You want to have a nine day hearing on it? He says Gloria Kendal took the furniture and put it there at his request (590).

The court nevertheless grudgingly agreed to hold a hearing (591), which under the applicable New York statute, Code of Criminal Procedure, §813-d3 (App. XIII, p. 115a) was required to be held "in the absence of the jury." The prosecutor then stated that he would defer the introduction of the chair until a later time, and it was agreed and understood that petitioner would "have an opportunity to raise the question * * * later" (593). The prosecutor counted on the fact that the chair would ultimately slip into evidence; and this is exactly what happened.

Gloria testified that she arranged for the storage of the Weissman apartment furniture, including the chair, under

the name Weissman, pursuant to petitioner's instruction to her to "get rid of the furniture" (1168-74, 1191-94). At the conclusion of Gloria's testimony, the prosecutor again offered the chair in evidence, and the court received it over defense counsel's objection (1193). Defense counsel then moved to strike the chair from evidence and reminded the court of the prior understanding. Nevertheless, the court denied the motion summarily and without a hearing (1194-95).

The stage was now set for another injustice. The chair contained on its seat, who knows from what source, a speck of human blood so minute that it could not be typed (1719-20). The prosecutor in his summation now used this infinitesimal trace of human blood on the seat of the chair to corrobate Gloria's testimony that Mark Fein had murdered Markowitz in the Weissman apartment. He pointed to the chair as having been "tested and found to have human blood" on it (2146-47).

But on the new trial motion the petitioner submitted the affidavit of Dr. Sidney B. Weinberg, which categorically stated that, in view of the nature of the bullet wounds, the decedent must have shed a considerable amount of blood (230B-233B).

The Appellate Division itself acknowledged that the tiny speck on the seat of the chair was too minute to serve as proof that the homicide had taken place in the apartment:

> * * * From the medical testimony it is fairly conclusive that the deceased must have shed a considerable quantity of blood. None of the three witnesses who

were in the apartment on the evening of October 10 saw any blood on the furniture, and an examination of the furniture disclosed only one minute speck on a chair. This speck was so small that it could not be typed. As proof that the homicide took place in the apartment, it can be disregarded. (App. X, pp. 71a-72a)

Nevertheless the prosecutor got his conviction; and the state courts sustained it.

It was only in denying the motion for a new trial that the trial judge as an afterthought accepted the theory that the petitioner had "abandoned" the chair (App. XI, p. 85a). Relying solely on this ground, the New York Court of Appeals rejected the petitioner's constitutional contentions and upheld the prosecution's use of the evidence (App. V, p. 43a). The Second Circuit followed suit (App. I, p. 19a).

IV—New York's Unconstitutional Blue Ribbon Jury Statute

We are but halfway through the number of unconstitutional means that the People used in the instant case to get a judgment of conviction against the petitioner. Yet a fourth unconstitutional means was the use of a blue ribbon jury. The prosecution moved for a special jury under the New York Judiciary Law, §749-aa, as then in effect and applicable to counties having a population of one million or more inhabitants (*i.e.*, only certain counties in New York City). New York subsequently repealed the special jury statute in its entirety; but the repeal was effective September 1, 1965, and hence inapplicable to the petitioner's trial and conviction. The petitioner opposed the motion (173A-176A). He urged the court to follow *Schuster* v. *City of New York,* 25 Misc. 2d 670, 205 N.Y.S. 2d 190 (Sup. Ct.,

Kings County 1960), which, in denying the motion for a special jury in a civil case relied on the dissenting opinion in *Fay* v. *New York*, 332 U.S. 261 (1947). The petitioner quoted *Schuster*:

> There can be no true equal representation of a community if jurors are selected because of an alleged economic, social, or superior educational status. * * * There is no justification today for a jury system which divides citizens into special or blue ribbon jurors and ordinary or general jurors. Such discrimination short-circuits our democratic processes. * * * 25 Misc. 2d at 684, 205 N.Y.S. 2d at 205.

The petitioner then alleged (175A) that under the Constitution of the United States and the command of the Supreme Court of the United States, the New York special jury statute was "no longer valid or viable." The prosecution's motion was nevertheless granted (167A), and special jury was empaneled at the petitioner's trial (164A-166A, 177A-178A).

There were 400 persons on the special jury panels (250 on the original panel and 150 on the additional panel) from which the special jury was drawn; and it is obvious from an inspection of the lists that the panels were exceptionally top-heavy with professional and executive people, that they contained very sparse representation of ordinary workingmen or daily wage earners—particularly, "blue collar" workers, and that they contained only 11 women out of the 400 persons. The result was the selection of a jury composed of people likely to be unduly influenced by their moral predilections against the petitioner.

The petitioner argued the invalidity of New York's blue ribbon jury system both in the Appellate Division, First Department, as well as in the New York Court of Appeals. The First Department felt that the point did not merit discussion. 24 A.D. 2d at 33, 263 N.Y.S. 2d at 631. The New York Court of Appeals held:

> Defendant's contention that the use of a special jury deprived him of his constitutional right to a fair trial has been considered before and found to be without merit (*Fay* v. *New York*, 332 U.S. 261; *Moore* v. *New York*, 333 U.S. 565). 18 N.Y. 2d at 168, 272 N.Y.S. 2d at 756.

After the federal Supreme Court's denial of review on January 23, 1967, the petitioner by motion requested the New York Court of Appeals to amend its remittitur, so as to state expressly that the Court of Appeals had necessarily passed upon the question of the validity, under the Constitution of the United States, of the New York blue ribbon jury statute (former Section 749-aa of the New York Judiciary Law) and had determined that this statute was not unconstitutional. Petitioner's motion in the New York Court of Appeals set forth the facts relating to the presentation of the blue ribbon jury issue in the New York courts. The motion showed that the record (174A-175A) left no doubt that the validity of the New York blue ribbon jury statute, under the federal Constitution, had been expressly drawn in question by a timely pleading filed by the petitioner in the trial court in advance of trial. The motion also argued that the New York Court of Appeals, in deciding the blue ribbon jury question on the authority of *Fay* v. *New York*, 332 U.S. 261 (1947), and *Moore* v. *New York*, 333 U.S. 565 (1948), must surely have intended to deter-

mine that the New York blue ribbon jury statute, which was applied to petitioner, was a constitutional statute—that is, that the statute was not subject to constitutional infirmity under the provisions of the federal Constitution.

In the New York Court of Appeals the District Attorney vigorously opposed petitioner's motion to amend the remittitur. The District Attorney claimed, among other things, that the Court of Appeals had not passed upon the validity of the blue ribbon jury statute. The New York Court of Appeals, however, which was in a position to state authoritatively what it had passed upon, rejected the District Attorney's contention, and unanimously granted petitioner's motion on February 21, 1967. *People* v. *Fein,* 19 N.Y. 2d 691, 278 N.Y.S. 2d 880. The New York Court of Appeals held:

> Motion to further amend remittitur granted. Return of remittitur requested and, when returned, it will be further amended by adding thereto the following. Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Appellant contended that the order of the trial court, subjecting him to a trial before a special jury rather than a general jury, denied him a fair trial and deprived him of due process and the equal protection of the laws. The Court of Appeals held that appellant's constitutional rights were not violated and that former section 749-aa of the Judiciary Law authorizing such a trial is constitutional. (App. VIII, p. 62a)

V—The Trial Judge's Statements to the Jury Violated the Petitioner's Right of Silence.

Yet a fifth violation of the petitioner's constitutional rights occurred when the trial judge in his statements to the jury impaired the petitioner's privilege against self-incrimination in violation of the Fifth and Fourteenth Amendments. The trial judge misinformed the jury:

> When you get to the trial in a civil case and the defendant does not open his mouth, does not come forward to defend himself, he has to lose the case. That is civil law. But there is no such thing in criminal law. (59)

This gratuitous inaccuracy (even under "civil law" a defendant's silence is not fatal) was promptly followed by other remarks which heightened its prejudice:

> If a person accused of crime wishes to testify he has the privilege to do so. That he may exercise. He does not have to. And it may not be commented upon at any time if he does not do so. (60)

* * *

In his charge to the jury the trial judge again commented upon the failure of the petitioner to take the stand:

> Now, a defendant has a right to go upon the witness stand and testify in his behalf, if he chooses to do so. If he does not choose to do so, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. Therefore, there will be no discussion of any kind concerning that. (2179)

These statements in effect indicated to the jury that they could draw an adverse inference from the petitioner's failure to take the stand. Thus they violated his right of silence under the Fifth and Fourteenth Amendments.

VI—Prejudicial Publicity, Emanating from the Police and the Prosecution

The People engaged in yet one more violation of the petitioner's constitutional rights in order to get his conviction: prejudicial publicity. In this case, as in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the news media had a field day. Immediately after the petitioner's arrest on February 21, 1964, the police launched an avalanche of charges, information and misinformation to the press which had the effect of convicting the petitioner in the eyes of the public before he was tried, and of vitiating his right to a fair trial. The police even made claims of evidence which the prosecution never was able to proffer at the trial. For example, the newspapers were given "information" that petitioner had put the murder gun in the duffle bag (103A). At the trial the prosecution was unable to produce any such evidence. Or again, information was given to the press that the rug cut out of the floor was "bloodstained" (103A). Even Carmella, alias Gloria testified, however, that she did not see any blood on the pieces of carpet (1355-56).

Indeed, the avalanche of charges, information and misinformation began with a two-hour press conference held by detectives on the morning of the arrest (59A).

These circumstances were brought to the court's attention in connection with a bail application filed by defense

counsel on March 2, 1964 (55A-89A). The court denied bail (89A, 7A), but took no steps whatsoever to halt the police press campaign nor to institute safeguards to assure that such severely prejudicial activities by the prosecution would cease. In fact they did not cease. Defense counsel on June 1, 1964, in renewing the bail application, brought to the court's attention two lengthy and lurid articles which had appeared in the June issues of *True Detective Magazine* and *Official Detective Stories* (90A-108A). Examination of these articles makes it clear that the authors were materially assisted by Detectives Leman and Lyons—the same police detectives who were later involved in the Dagmar episodes. These detectives were quoted at length in a demonstration of their ingenuity and brilliance in solving the case. Again, the court took no steps to bring a halt to such activities. Later, even during the trial, it would appear that the detectives maintained a close relationship with the press, and publicly prejudicial to the petitioner continued to be printed. A lengthy article was published in the *New York Herald Tribune* of November 18, 1964 (174B), which from its contents must surely have been inspired by Detective Lyons. Because of its particularly prejudicial nature, defense counsel promptly brought it to the court's attention (1675-78). One of the jurors actually admitted having seen this article, though he claimed he had not "read" it (1677). Despite this, and despite the presence of alternate jurors from whom a substitute juror could have been selected (1678), the court did not remove that juror.

The petitioner's new trial motion urged the constitutional question under the due process clause of the Fourteenth Amendment (28B, 140B-147B, 154B-174B). The New York Court of Appeals (App. V, p. 43a) sustained the trial judge's ruling (App. XI, p. 85a) rejecting this contention.

B. Basis for Federal Jurisdiction

The basis for federal jurisdiction in the federal court of first instance is 28 U.S.C. §2254. All six of the petitioner's constitutional deprivations were argued in the state courts. All six were argued before Judge Palmieri, either on the petitioner's request for a writ of habeas corpus or on his motion for a certificate of probable cause. Indeed, the petitioner in support of his motion for a certificate of probable cause submitted to Judge Palmieri as well as served on the respondent, the page proof of what became his brief in the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

I

The prosecution's suppression of exculpatory evidence, whether due to inadvertence, negligence, willfulness, or an excess of zeal, and whether or not defense counsel made a request for such evidence, and whether more diligent or more fortunate defense counsel might possibly have come upon such evidence on his own, is a violation of the due process clause of the Fourteenth Amendment.

The trial of a criminal case is no longer a game. It is an effort to do justice. To an ever greater extent, prosecutors have been required to furnish defense counsel with exculpatory evidence in their possession. In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the federal Supreme Court explained its progression from *Mooney* v. *Holohan*, 294 U.S. 103 (1935), through *Pyle* v. *Kansas*, 317 U.S. 213 (1942), to the point where any suppression of evidence favorable to the defense by a prosecutor constitutes a violation of due process. In *Brady* the petitioner and a companion Boblit were involved in a murder. Boblit gave a statement to the prosecution that he was the one who did the actual killing. This statement was withheld by the prosecution. Both the Maryland Court of Appeals as well as the United States Supreme Court ruled that this suppression constituted a violation of due process. The federal Supreme Court held and said:

> We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The

> Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—*United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815, 33 A.L.R. 2d 1407, and *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763—which, we agree, state the correct constitutional rule. 373 U.S. at 86.

The law on the duty of the prosecution to disclose to the defense evidence favorable to it, Judge, now Chief Judge, Fuld stated well in two paragraphs in his dissenting opinion in the instant case:

> The concept of fairness, of due process, imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused, particularly when such evidence contradicts the testimony given by the People's witnesses in open court. (See *Brady* v. *Maryland,* 373 U.S. 83, 87; *Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; *Mooney* v. *Holohan,* 294 U.S. 103; *Levin* v. *Katzenbach,* 363 F.2d 287; *Barbee* v. *Warden,* 331 F.2d 842; *People* v. *Robertson,* 12 N.Y. 2d 355; *People* v. *Zimmerman,* 10 N.Y. 2d 430; *People* v. *Savvides,* 1 N.Y. 2d 554.) This duty persists even though the defense might, by dint of a little more effort, have independently uncovered the evidence in question and even though the district attorney regards it as lacking in probative force or worthless. The prosecution is not privileged "to decide for the court what is admissible or for the defense what is useful". (*Griffin* v. *United States,* 183 F.2d 990, 993.)
>
> The argument that disclosure would not have changed the verdict "overlooks the variant functions to be performed by jury and reviewing tribunal". (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) It is for jurors, not judges of an appellate court such as ours, to decide the issue of credibility, and we should be particularly observant of this principle in the case

> before us, where disclosure might well have impeached the one witness without whom there would admittedly have been no prosecution. In this view, it "matters little" that the district attorney's silence was not the result of guile or a desire to prejudice. (*People* v. *Savvides*, 1 N.Y. 2d 554, 557, *supra*.) "The principle of *Mooney* v. *Holohan* [294 U.S. 103, *supra*]," as the Supreme Court has pointedly observed (*Brady* v. *Maryland*, 373 U.S. 83, 87, *supra*), "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."
>
> I would reverse and order a new trial. (App. VI, pp. 56a-57a, 18 N.Y. 2d at 177-78, 272 N.Y.S. 2d at 764, 281 N.E. 2d at 281-82.)

Nor is a request for the specific exculpatory evidence required before the government has a duty to disclose. As Mr. Justice Fortas stated in his concurring opinion in *Giles* v. *Maryland*, 386 U.S. 66, 102 (1967):

> * * * I see no reason to make the result turn on the adventitious circumstances of a request. If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event.

Nor is it the prosecutor's job, as Judge, now Chief Judge, Fuld also indicated in his dissenting opinion in the instant case to pass upon the worth of exculpatory evidence or its credibility. That job is for defense counsel and the jury. Or as this Court put it in *Brady* v. *Maryland*, 373 U.S. 83, 88 (1963), a course which permits a prosecutor to pass on the worth or credibility of exculpatory evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."

District Judge Bartels writing for the Second Circuit chose to treat this point as if it were a motion for a new trial based on newly discovered evidence (App. I, p. 15a). He is mistaken. It is not. This is a case of suppression; and presents a federal constitutional question governed by *Chapman* v. *California,* 386 U.S. 18 (1967), and the cases which followed it. *Chapman* specifically held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

The Court has repeatedly reaffirmed its *Chapman* ruling. In *Burgett* v. *Texas,* 389 U.S. 109 (1967), the Court reversed a conviction because of a reference to a constitutionally infirm prior criminal conviction, and did so despite the fact that the trial judge had instructed the jury to disregard it.

In *Anderson* v. *Nelson,* 390 U.S. 523, 525 (1968), the Court ordered habeas corpus relief because the Court could not say that a violation of one of petitioner's constitutional rights was "harmless beyond a reasonable doubt," in the words of *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

Again, in *Fontaine* v. *California,* 390 U.S. 593 (1968), the Court ordered habeas corpus relief for a state prisoner because the Court could not say that a violation of one of the petitioner's constitutional rights was harmless beyond a reasonable doubt. The Court reasoned:

> Subsequently, we decided *Chapman* v. *California,* 386 U.S. 18 (1967), which disapproved of California's harmless error rule as applied to federal constitutional errors. Thereafter, we granted a petition for a writ

> of certiorari in the instant case, vacated the judgment below, and remanded for further consideration in light of *Chapman.* 386 U.S. 263 (1967). On remand, the District Court of Appeals reinstated its former opinion except that it rewrote the portion dealing with harmless error. This time it recited that the constitutional error in this case was harmless "beyond a reasonable doubt"—the standard announced in *Chapman.*
>
> * * *
>
> * * * it was error for the court below to hold that the comments of the prosecutor and the trial judge were harmless "beyond a reasonable doubt."
>
> * * *
>
> * * * In these circumstances, the State has not met its burden of proving beyond a reasonable doubt that the erroneous comments and instruction did not contribute to petitioner's conviction. *Chapman* v. *California,* 386 U.S., at 24, 25-26.

390 U.S. at 595, 596.

The California Supreme Court finally gave *Chapman* v. *California,* 386 U.S. 18 (1967), full application in *People* v. *Johnson,* 68 Cal. Rptr. 599, 441 P. 2d 111 (1968), *cert. denied,* 393 U.S. 1051 (1969).

The effect of the formulation of District Judge Bartels would be that, while issues of credibility are normally to be tried by the jury in criminal cases, nevertheless an exception exists which permits the judge to determine such credibility matters once and for all when, as here, the prosecution has suppressed or concealed or withheld material evidence until after the trial. This would be not only a fundamental invasion of the right to trial by jury and a violation of the due process clause, but a violation of the equal protection clause as well. For then the question

would go not only to whether the Constitution requires a state to accord a Sixth Amendment type of jury trial to a defendant charged with murder, but also "to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord". *Turner* v. *Louisiana,* 379 U.S. 466, 471 (1965). It would involve a totally arbitrary and unreasonable classification. Compare *Baxstrom* v. *Herold,* 383 U.S. 107 (1966). It would take away a substantial portion of the benefits of trial by jury from those defendants, and only from those defendants, who had the misfortune to be victimized by the prosecution's wrongful conduct. Moreover, it would reward the prosecutor for indulging in such wrongful conduct. If the prosecutor's suppression were not detected, the conviction would stand; and if it were detected, the prosecutor would then obtain a determination solely from the judge, rather than from a jury, as to the credibility of the witnesses he concealed. Surely there is no room under the Constitution for such a scheme.

II

The denial of pretrial discovery and inspection of the bullets found in the decedent violated the due process clause of the Fourteenth Amendment.

We submit that the traditional view that denials of pretrial discovery lack constitutional dimension is anomalous, unjust, obsolete, and contrary to the modern trend towards full disclosure. The modern trend is indicated for example in the enlarged discovery rights in federal criminal trials in the 1966 amendments to Rule 16 of the Federal Rules of

Criminal Procedure. Moreover, a few days before this amendment went into effect, the Court in *Dennis* v. *United States,* 384 U.S. 855, 870-71 (1966), took occasion to praise this amendment and the broadening of disclosure in criminal cases. The Court, after commenting that lower federal courts had made grand jury testimony available to defendants in a variety of circumstances continued:

> These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, 18 U.S.C. §3500 (1964 ed.), responding to this Court's decision in *Jencks* v. *United States,* 353 U.S. 657, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice.[17]

Then in footnote 17 the Court praised the amendments to Rule 16:

> 17. See, *e.g.,* the Amendments to Rule 16 of the Federal Rules of Criminal Procedure, approved by this Court on Febary 28, 1966, and transmitted to Congress, which authorize discovery and inspection of a defendant's own statements, the results of various tests, and the recorded testimony of the defendant before the grand jury (and see the Advisory Committee's Note thereon). See also, cases anticipating this broadening of criminal discovery: for example, *Cicenia* v. *Lagay,* 357 U.S. 504, 511; *United States* v. *Peace,* 16 F.R.D. 423 (D.C. S.D.N.Y. 1954); *United States* v. *Willis,* 33 F.R.D. 510 (D.C. S.D.N.Y. 1963); *United States* v. *Williams,* 37 F.R.D. 24 (D.C. S.D.N.Y. 1965); *United States* v. *Nolte,* 39 F.R.D. 359 (D.C. N.D. Cal. 1965); *State* v. *Johnson,* 28 N.J. 133, 145 A.2d 313 (1958); *People ex rel. Lemon* v. *Supreme Court,* 245 N.Y. 24, 156 N.E. 84 (1927).
>
> Among the commentators who have argued in favor of broadening criminal discovery are Brennan, The Criminal Prosecu-

tion: Sporting Event or Quest for Truth? 1963 Wash. U.L.Q. 279; Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. Rev. 228 (1964); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960); Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1051-1063 (1961). Of particular relevance to the question of grand jury secrecy are: Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668 (1962); and Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455 (1965).

Subsequently, in *Will* v. *United States*, 389 U.S. 90 (1967), the Court overturned an order of the Seventh Circuit which would have prevented a federal district judge from requiring the government to furnish a list of its informants to a defendant.

In the instant case, petitioner's inspection of the bullets before trial was important to the preparation of his defense. It was important in order for him to have "the scales evenly balanced in his contest with the state". See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash U.L.Q. 279, 285; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1192 (1960). The murder weapon or weapons were never found, so that the bullets were of crucial importance. The impression conveyed to the jury by the prosecution's expert witness that all four bullets had been fired from one firearm might have been disproved if such discovery had been permitted. Moreover, evidence tending to show that there was more than one weapon would have compelled submission to the jury of the requested accomplice instruction with respect to Gloria. Nor could the legitimate interests of the prosecution have been prejudiced by the granting of such limited discovery.

The circumstances make this murder case a most appropriate vehicle for articulating the limitations which the due process clause imposes on the states in the interests of achieving a substantial degree of fundamental fairness in this area.

III

The admission into evidence over objection and without a hearing of a chair obtained as a result of an illegal search and seizure violated the Fourth and Fourteenth Amendments.

The chair (Ex. 54) was illegally seized, without a search warrant, without anyone's consent, and over the protest of the warehouse manager. Moreover, this illegal search and seizure was directed specifically against the petitioner, whom the police had already arrested. Nor was there the slightest showing of necessity or emergency to justify this arbitrary and unreasonable seizure. The police had seen the chair in the warehouse about two weeks before (1536), and had had ample time to apply for a search warrant if they thought they were entitled to one.

There is likewise no doubt but that the Court under the due process clause of the Fourteenth Amendment has made the Fourth Amendment as fully applicable to the states as to the federal government. A large step in this direction was *Mapp* v. *Ohio,* 367 U.S. 643 (1961), where the Court held that material illegally seized by state officers was inadmissible even in a state court proceeding. This involved a major change; for in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the Court overruled its earlier and oftcited case to the contrary, *Wolf* v. *Colorado,* 338 U.S. 25 (1949). The Court

completed the change in *Ker* v. *California,* 374 U.S. 23 (1963), where it announced that its *Mapp* holding was enforceable against the states not only by the same sanction of exclusion as against the federal government, but also by the same constitutional standard prohibiting unreasonable searches and seizures.

The instant state case thus presents the question whether the petitioner, who was already charged and in custody, has standing to object to an illegal search and seizure because the search was directed specifically against him. One would have thought that under *United States* v. *Jeffers,* 342 U.S. 48 (1951), *Jones* v. *United States,* 362 U.S. 257 (1960), *Stoner* v. *California,* 376 U.S. 483 (1964), and *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), he did. However, the lower courts held otherwise.

In *Jones* v. *United States,* 362 U.S. 257 (1960), the Court, while it was able to rest its ground of decision on possessory considerations, also declared that a defendant does have standing if he was the target of the search and seizure, that is, if he was the victim of the search. The Court after quoting Rule 41(e) of the Federal Rules of Criminal Procedure continued:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. * * *
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search

> as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. * * *.
>
> * * *
>
> * * * We are persuaded * * * that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. * * *

362 U.S. at 261, 266.

Then in *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), the Court in its full application of the Fourth Amendment to the states under the due process clause of the Fourteenth Amendment, extended *Jones* v. *United States,* 362 U.S. 257 (1960), to give standing to an indicted union official to object at his state trial to documents seized from the union office that he shared with others. Mr. Justice Black, in a dissent which Mr. Justice Stewart joined, complained that the Court was preparing the way to use *Jones* to eliminate entirely the requirement for standing:

> * * * In fact the Court's opinion indicates to me that the Court is preparing the way to use *Jones* to eliminate entirely the requirement for standing to raise a search and seizure question and to permit a search to be challenged at any time, at any place, and under all circumstances, regardless of the defendant's relationship to the person or place searched or to the things seized. * * *

392 U.S. at 376.

However, from the Court's recent opinions in *Alderman* v. *United States,* 37 U.S.L. Week 4189 (March 10, 1969), it would appear that the question of standing of one against whom an illegal search was directed is still open. Mr. Justice Fortas in Part II (in which Mr. Justice Douglas joined) of his opinion, concurring in part and dissenting in part, found it necessary, after quoting from *Jones,* and underscoring the words *"one against whom the search was directed,"* to say:

> It is my position that this quotation read in light of the Court's rejection of property concepts, requires that we include within the category of those who may object to the introduction of illegal evidence "one against whom the search was directed." Such a person is surely "the victim of an invasion of privacy" and a "person aggrieved," even though it is not his property that was searched or seized. As I think the Court recognized in *Jones,* unless we are to insist upon property concepts, it is enough to give him "standing" to object that the government agents conducted their unlawful search and seizure in order to obtain evidence to use against him. The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial. See *Rosencranz* v. *United States,* 334 F.2d 738, 741 (C.A. 1st Cir. 1964) (concurring opinion).

37 U.S.L. Week at 4198.

Indeed, Mr. Justice Fortas went further and indicated that he might be persuaded to eliminate entirely the requirement of standing:

> * * * The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government

> will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons. Accordingly, commentators have urged that the necessary implication of the Fourth Amendment is that any defendant against whom illegally acquired evidence is offered, whether or not it was obtained in violation of his right to privacy, may have the evidence excluded. It is also contended that this is the only means to secure the observance of the Fourth Amendment.
>
> I find these arguments cogent and appealing. * * *

37 U.S.L. Week at 4197.

The California Supreme Court has in fact taken this advanced position: it has held that a defendant has standing to challenge the admissibility of evidence produced by an illegal search and seizure, irrespective of whether the particular defendant had any kind of possessory interest or was the target of the search. *People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855 (1955); *cf. People* v. *DeFilippis,* 34 Ill. 2d 129, 134-135, 214 N.E. 2d 897, 900 (1966).

Even assuming Gloria's testimony about the chair to be correct and conclusive, there are decisions which have held, on facts more compelling for the prosecution, that there was no "abandonment" for Fourth Amendment purposes. *Hobson* v. *United States,* 226 F.2d 890 (8th Cir. 1955); *Work* v. *United States,* 243 F.2d 660 (D.C. Cir. 1957); *United States* v. *Merritt,* 293 F.2d 742 (3d Cir. 1961).

In any event, under the Constitution, the petitioner was at least entitled to a hearing on the unlawfulness of the seizure of the chair, and at such a hearing any factual

issue of abandonment, if relevant, could have been fully explored and actually and reliably determined. The New York courts totally denied the petitioner such a hearing, despite a New York statute which mandated it, and despite a distinct understanding with the trial judge and the prosecutor that a hearing would be held. This contravened the most basic principles of due process and fair play. It plainly conflicted with *Jackson* v. *Denno,* 378 U.S. 368, 376-77, 380 (1964) where, in connection with New York's procedure for determining admissibility of confessions, the Court held that the defendant had a "constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness" as well as "a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined". Certainly the applicable principles can be no different for an unlawful search and seizure.

Petitioner should have been accorded a fair hearing in which both the lawfulness of the seizure and the underlying factual issues, including any claim that he abandoned the seized property, were "actually and reliably determined". In was in effect so decided by the Ninth Circuit's decision in *Cunningham* v. *Heinze,* 352 F.2d 1, 3 (9th Cir. 1965), *cert. denied,* 383 U.S. 968 (1966):

> * * * The district court is therefore required to hold an evidentiary hearing "unless the state-court trier of facts has after a full hearing reliably found the relevant facts". Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed. 2d 770 (1963).

The trial court never even intimated during the trial that it was basing its ruling on the ground that the chair had been abandoned; its abandonment theory first appeared in its opinion denying the motion for new trial. If the abandonment issue had been raised, Gloria could have been fully cross-examined on it. Moreover, if the court had proceeded to conduct the hearing it was obligated and had committed itself to conduct, then the petitioner, besides adducing other evidence, could have testified in the absence of the jury as to whether he had abandoned the chair or whether the chair had merely been placed in storage for him. Denial of the hearing prevented the petitioner, who was the only other party to the alleged conversation, from testifying as to what occurred. A trial judge who has absolutely refused to conduct such a hearing cannot justly determine that abandonment occurred. A state court criminal proceeding which rides roughshod over the right to a hearing should not be allowed to stand.

The lower courts by their decisions in the instant case have utilized the doctrine of no standing as a handy means for circumventing the policies which *Mapp* and succeeding cases were intended to effectuate.

The teaching of the lower courts for the New York police—one of the largest police forces in the world—is that any search and seizure conducted in contempt of the Constitution will nevertheless get by if afterwards it can be shown that the defendant does not have an interest in the premises searched or the property seized. "Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of

others by the use of the evidence illegally obtained against them.'' *People* v. *Martin,* 45 Cal. 2d 755, 760, 290 P. 2d 855, 857 (1955).

IV

New York's blue ribbon jury statute, under which the instant case was tried, violates the Sixth and Fourteenth Amendments.

The specifics of the Sixth Amendment have now been made fully applicable to the states by the due process clause of the Fourteenth Amendment. This includes the Sixth Amendment's guarantee of the right to trial by jury. *Parker* v. *Gladden,* 385 U.S. 363 (1966); *Duncan* v. *Louisiana,* 391 U.S. 145 (1968). In *Duncan* the appellant was convicted of a simple battery, a misdemeanor; and received a sentence of 60 days and a fine of $150.00. However, his sentence could have been as much as two years. The Court held that he was entitled to a jury trial, saying through Mr. Justice White:

> * * * Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. * * *

391 U.S. at 149.

The process of making the specifics of the Sixth Amendment fully applicable to the states began with *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and *Pointer* v. *Texas,* 380 U.S. 400 (1965), where the Court made the Sixth Amend-

ment's rights to counsel and to confrontation as fully applicable to the states as to the federal government. *Gideon* v. *Wainwright,* like *Mapp* v. *Ohio,* wrought a great change, and, like *Mapp,* overruled an earlier and much cited case, *Betts* v. *Brady,* 316 U.S. 455 (1942), which had confined the Fourteenth Amendment's due process right to counsel in state noncapital cases to those instances where the surrounding circumstances demonstrated that the accused could not adequately present his own defense.

Accordingly, the systematic exclusion of any recognizable, identifiable group, be it racial, ethnic, sexual, religious, ethical, economic, social, political, or geographical, within the community from which state juries are drawn, violates the Sixth Amendment's requirement for trial by an impartial jury. Women constitute such a group. Daily wage earners constitute such a group. And individuals with scruples against capital punishment constitute such a group. Moreover, the last group comprises half of the community—and it is growing.

The most numerous cases are those involving the exclusion of Negroes from grand or petit juries, or both. See, *e.g., Sims* v. *Georgia,* 389 U.S. 404 (1967) (grand and petit juries); *Jones* v. *Georgia,* 389 U.S. 24 (1967) (grand and petit juries); *Whitus* v. *Georgia,* 385 U.S. 545 (1967) (grand and petit juries); *Arnold* v. *North Carolina,* 376 U.S. 773 (1964) (grand juries); *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958) (grand juries); *Smith* v. *Texas,* 311 U.S. 128 (1941) (grand juries); *Norris* v. *Alabama,* 294 U.S. 587 (1935) (grand juries); *Strauder* v. *West Virginia,* 100 U.S. 303 (1879) (grand and petit juries).

The exclusion of women from jury service was involved in *Ballard* v. *United States,* 329 U.S. 173 (1946), and *Glasser* v. *United States,* 315 U.S. 60 (1942).

In *Thiel* v. *Southern Pacific Co.,* 328 U.S. 211 (1946), the Court proscribed the exclusion of daily wage earners as a class. *Accord, Labat* v. *Bennett,* 365 F.2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967). Indeed, in *Thiel* the Court stated that the systematic exclusion of members of any of these groups was illegal:

> * * * the economic, social, religious, racial, political and geographical groups of the community; * * *

328 U.S. at 220.

In *Labat* v. *Bennett,* 365 F.2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967), the Fifth Circuit's majority opinion, in setting aside Louisiana state court convictions held:

> The exclusion of daily wage earners *as a class* violates the petitioners' due process and equal protection rights to an impartial jury representing a cross-section of the community.

365 F.2d at 719-20.

The concurring opinion on behalf of Judges Bell and Coleman was rested solely on this ground. 365 F. 2d at 739-42. It thus seems evident that, in the states comprising the Fifth Circuit, a state court blue ribbon jury system could not now survive the scrutiny of the Fifth Circuit. The result should not be different elsewhere.

In *Hernandez* v. *Texas,* 347 U.S. 475 (1954), the Court invalidated the systematic exclusion of persons of Mexican descent from grand and petit juries.

In *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966), the Fifth Circuit held that too much of a reliance on the "key man" system of juror selection, and too little of an effort to obtain a fair cross-section of the community required the dismissal of the indictments in that case.

In the light of these developments, *Moore* v. *New York*, 333 U.S. 565 (1948), and *Fay* v. *New York*, 332 U.S. 261 (1947), the two five-to-four decisions of more than 20 years ago, on which the New York Court of Appeals placed its entire reliance in sustaining New York's blue ribbon jury statute (App. V, p. 43a), and on which District Judge Bartels placed his reliance (App. I, p. 20a), no longer represent the law. The constitutional doctrine which should now commend itself to the Court is the doctrine so powerfully expressed in the dissenting opinion in *Fay* (332 U.S. at 299-300):

> * * * there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people. * * *

and in the dissenting opinion in *Moore* (333 U.S. at 570):

> The vice lies in the very concept of "blue ribbon" panels—the systematic and intentional exclusion of all but the "best" or the most learned or intelligent of the general jurors. Such panels are completely at war

> with the democratic theory of our jury system, a theory formulated out of the experience of generations. * * *

The *Fay* majority placed some reliance, 332 U.S. at 285-86, on the fact that the data there proffered concerning actual operation of the blue ribbon jury system consisted of New York Judicial Council studies for the period 1933-1934, instead of later years. But subsequent to *Fay* another Judicial Council study, made in 1952, fully confirmed the discriminatory and unfair operation of this New York special jury scheme, and its continued and inherent departure from the principle that juries should be drawn from a representative cross-section of the community.

Thus the 1952 study showed (App. XII, p. 104a) that "the most significant difference between the special and general panel is occupational" and that "those who may be called working people * * * constitute a larger portion of the general panel than they do of the special panel." Thus in New York County, business people made up 47% of the special jury panel, although they made up only 23% of the general jury panel. On the other hand, the lower economic groups, skilled and unskilled laborers, and the like, made up 7% of the special jury panel as against 17% of the general jury panel. *New York Judicial Council Report* 165 (1952). This discriminatory operation of the special jury was particularly marked in the present case. The 1952 study likewise reported (App. XII, p. 106a) that in New York County women constituted 2% of the special panel but 11% of the general panel; in this case, too, the exceptionally low representation of women (11 out of 400 in the two special panels) has been maintained.

New York's blue ribbon jury system resulted in panels which not only severely discriminated against lower economic groups and women, but also totally discriminated against scrupled individuals. Indeed, the object of this statute was to effect the exclusion from blue ribbon jury panels of all those individuals who had conscientious scruples against capital punishment. See *People* v. *Hall,* 169 N.Y. 184, 196 (1901); *People* v. *Blanchfield,* 45 Misc. 2d 536, 538-39, 257 N.Y.S. 2d 438, 441-2 (Sup. Ct. N.Y. County 1965).

But as Mr. Justice Stewart pointed out in the Court's opinion in *Witherspoon* v. *Illinois,* 391 U.S. 510, 519-20 (1968), scrupled jurors constitute about one-half of the people in this country: "Yet, in a nation less than half of whose people believe in the death penalty,[16] a jury composed exclusively of such people cannot speak for the community." In footnote 16 he added:

> It appears that, in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at p. 84 (1967). In 1960, the comparable figures were 51% in favor, 36% opposed, and 13% undecided. Ibid.

On November 3, 1964, while the Mark Fein trial was under way, the People of the State of Oregon at a general election voted to abolish capital punishment by 455,654 to 302,105, or more than 60%. Ore. Laws 6 (1965). Thus New York's blue ribbon juries represented only a small fractional section of the community.

But as both Mr. Justice Stewart in the Court's opinion in *Witherspoon,* and Mr. Justice Douglas in his concurring opinion, recognized in citing *Glasser* v. *United States,* 315 U.S. 60, 84-86 (1942), the Sixth Amendment's provision for trial by an impartial jury, made fully applicable to the states by the due process clause of the Fourteenth Amendment, requires a panel which fairly represents "a cross-section of the community." 315 U.S. at 86.

Even Mr. Justice White in his dissenting opinion in *Witherspoon* recognized that jury panels from which jurors who determine guilt or innocence are chosen, must represent a fair cross-section of the community, when he commented in his first footnote:

> While I agree generally with the opinion of MR. JUSTICE BLACK, and so have joined it, I would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt.

391 U.S. at 541, n. 1.

Moreover, everybody in New York but the courts recognized that blue ribbon juries were not impartial. Everybody but the courts knew that blue ribbon juries were handpicked by a special system which discriminated against laborers and other members of the lower economic classes. Everybody knew that blue ribbon juries did not represent a cross section of the community. Everybody knew that the blue ribbon jury system assured the state of juries whose members were partial to the prosecution on the issue of guilt or innocence.

Prosecutors knew; for in the ten-year period from 1941 to 1950 they requested every special jury that was impanelled, save one. *New York Judicial Council Report* 164 (1952).

Counsel for defendants knew; for in this ten-year period, with but this single exception, they never requested a blue ribbon jury.

The New York Judicial Council knew; for it repeatedly requested the repeal of New York's blue ribbon jury statute.

The Committee on Criminal Courts of the Association of the Bar of the City of New York knew; for it favored the abolition of blue ribbon juries.

The New York courts themselves began to recognize the defects of the blue ribbon jury system when Mr. Justice Abraham N. Geller in *People* v. *Blanchfield*, 45 Misc. 2d 536, 257 N.Y.S. 2d 438 (Sup. Ct. N.Y. County 1965), although granting a motion for a special jury, in effect declared invalid the machinery set up by the statute for selecting the blue ribbon jury.

Senator Jeremiah B. Bloom, the sponsor of the legislation which abolished New York's blue ribbon jury system, knew; for in his memorandum in support of this legislation he stated, referring to New York's blue ribbon statute:

> If its constitutionality was to be tested at this time the article would most probably be found to be violative of the right of citizens to equal protection under

> the law, as guaranteed by the 14th Amendment. *New York State Legislative Annual* 34 (1965).

The New York legislature itself knew; for in 1965 it finally abolished New York's blue ribbon jury system.

The exclusive nature of New York's blue ribbon jury system explains why blue ribbon juries convicted in a substantially greater percentage of cases than general juries. For example, a study for the defense in *Moore* v. *New York*, 333 U.S. 565, 567 (1948), showed that in the ten-year period from July 1, 1937 to June 30, 1946 special juries in Bronx County "convicted in 79% of the cases while the general juries convicted in 57%."

The Court in *Fay* v. *New York*, 332 U.S. 261 (1947), was sensitive to the problem:

> But a ratio of conviction so disparate, if it continued until 1945, might, in absence of explanation, be taken to indicate that the special jury was, in contrast to its alternate, organized to convict. A defendant could complain of this inequality even if it were shown that a special jury court never had convicted any defendant who did not deserve conviction.

332 U.S. at 286.

However, the Court was reluctant to throw the statute out because it felt that there was insufficient evidence to show intentional exclusion. But in *Whitus* v. *Georgia*, 385 U.S. 545 (1967), *Jones* v. *Georgia*, 389 U.S. 24 (1967), and *Sims* v. *Georgia*, 389 U.S. 404 (1967), the Court held that the defense did not have to show intentional exclusion. It was sufficient to show that a fair cross section was lacking.

The Mark Fein blue ribbon jury did not represent a fair cross-section.

In *Whitus,* the Court vacated the judgment of conviction when it was shown that Negroes constituted 27.1% of the tax rolls, but only 9.3% of the grand jury venire and 7.8% of the petit jury venire. The Court held that the State was required to explain this discrepancy. In *Jones,* the Court held that the burden was on the State to explain the disparity between the percentage of Negroes on the tax digest and those on the venires. The Supreme Court based its decision on the fact that the tax rolls showed 20% Negroes, and only 5% of the jury list was Negro. It did not require the defendant to show any intent to discriminate.

Reference may also be made to *Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. 1966), where the Fifth Circuit reversed a conviction of a white defendant because the system of choosing jurors discriminated against Negroes, even though there may have been no intent to exclude. The court held:

> In defense of the jury commissioners, it is said that they did not specifically intend to exclude Negroes from federal juries. The jury commissioners must be held to have intended the natural result which flowed from their conduct.

366 F.2d at 56.

As a result of the 1952 study, the New York Judicial Council renewed its recommendation that special juries be abolished. The deeper constitutional doubts raised by the 1952 study and Report once again spurred the movement

for legislative reform (see, for example, the excerpt from the April 26, 1965 Report of the Committee on Criminal Courts, Association of the Bar of the City of New York, App. XII, pp. 106a-108a). Meanwhile, post-*Fay* decisions in numerous other states had begun to give wholehearted endorsement to the principle that juries in criminal trials must be drawn from a representative cross-section of the community. See, *e.g., People* v. *White,* 43 Cal. 2d 740, 752-753, 278 P.2d 9, 17 (1954), *cert. denied,* 350 U.S. 875 (1955); *Allen* v. *State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State* v. *Ferraro,* 146 Conn. 59, 147 A. 2d 478 (1958), *cert. denied,* 369 U.S. 880 (1962), *State* v. *Dodge,* 12 Utah 2d 293, 365 P.2d 798 (1961); *Crawford* v. *State,* 408 P. 2d 1002 (Alaska, 1965); *State* v. *Madison,* 240 Md. 265, 272-273, 213 A.2d 880, 885 (1965); *State* v. *Jones,* 44 Del. 372, 57 A.2d 109 (Ct. Oyer & Terminer, 1947). In New York, legislative reform was finally accomplished by New York Laws 1965, c. 778, §3; but this was too late for the petitioner's trial.

The fact that New York has now abolished the blue ribbon jury system does not render the question presented by this petition any less substantial. The long-overdue legislative reform finally enacted in New York is of no avail to the petitioner, who has been sentenced to serve thirty years to life imprisonment after being tried under this unconstitutional jury statute. Moreover, a decision sustaining the petitioner's contention will give further notice to the comparatively small group of states which still authorize the use of special or struck juries in criminal cases that such fundamentally discriminatory and unfair methods of selecting juries can no longer be tolerated under the Constitution. There are some states which still have statutes authorizing the use of special or struck juries in certain

criminal cases. Alabama Code, Appendix (Vol. 14), §§713-719 (counties with population of 400,000 or more); Delaware Code Ann., Title 10, §§4541-4543; Indiana Stat. Ann., §§4-7108 to 4-7114 (Burns) (1968 Replacement); New Jersey Stat. Ann., §§2A:75-1 to 2A:75-5.

V

The trial judge's statements to the jury violated the petitioner's right to silence under the Fifth and Fourteenth Amendments.

It was in the Court's opinion in *Malloy* v. *Hogan*, 378 U.S. 1, 5, 10 (1964), that Mr. Justice Brennan was at long last able to say that the Fifth Amendment's privilege against self-incrimination was applicable to the states. In *Malloy* the privilege, or right of silence as it is more descriptively called, got the Court's usual broad application. It covered even answers which would furnish only a link in the chain of evidence. Moreover, it applied whenever a witness felt that his answer might tend to incriminate him, unless the judge could see with perfect clearness that the answer could not possibly have such a tendency. This left the witness pretty much in the driver's seat.

Malloy v. *Hogan* overruled not one but two earlier leading cases: *Adamson* v. *California*, 332 U.S. 46 (1947); as well as *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

In the yet more recent case of *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that its ruling in *Malloy* that the Fifth Amendment privilege against self-incrimination was to be applied to the states in the same manner

as against the federal government, was to be taken literally: accordingly the federal rule against comment on a defendant's failure to take the stand governed in the states as well.

Thus *Bruno* v. *United States,* 308 U.S. 287, 294 (1939), becomes fully applicable to the states. There the Court held that "the accused should be allowed to make his own choice" as to whether the court should give any instruction on the right not to testify. If he wants such an instruction, he is entitled to it, but the trial judge may not call attention to the defendant's silence if the defendant has not requested such an instruction.

Reference may also be made to *Redfield* v. *United States,* 315 F.2d 76, 80 (9th Cir. 1963), where the court held that a defendant's right of silence may "be violated by an official statement in the presence of the jury that the defendant is entitled to testify". *Accord, McKnight* v. *United States,* 115 Fed. 972 (6th Cir. 1902).

Indeed, prior to the instant case, New York reviewing courts repeatedly reversed convictions because of the remarks of trial judges to juries elaborating on the constitutional or statutory language. *People* v. *McLucas,* 15 N.Y. 2d 167, 256 N.Y.S. 2d 799 (1965); *People* v. *Manning,* 278 N.Y. 40 (1938); *People* v. *Forte,* 277 N.Y. 440 (1938); *People* v. *Fitzgerald,* 156 N.Y. 253 (1898); *People* v. *Arthurs,* 3 A.D. 2d 966, 161 N.Y.S. 2d 971 (4th Dep't 1957). But none of these authorities, all of which were cited as well as quoted in the petitioner's brief in the New York Court of Appeals, did him any good.

VI

Prejudicial publicity, emanating from the police and the prosecution, violated the due process clause of the Fourteenth Amendment.

The New York Court of Appeals sought to dispose of petitioner's point under *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), about prejudicial publicity, on the grounds (1) that the publicity in question for the most part took place at the time of the arrest, nearly eight months prior to trial, (2) that four months prior to trial, defense counsel had argued that petitioner was ready to go to trial, and (3) that petitioner had not sought a change of venue (App. V, p. 43a). None of these grounds is adequate. Both separately and together, they show that the New York courts are unprepared to accept the minimum due process standards expressed in the federal Supreme Court's decisions. Thus, to say that most of the prejudicial publicity took place at the time of arrest (on February 21, 1964) is to ignore both the lurid June 1964 magazine articles, and the prejudicial publicity during the trial itself. To give weight to the fact that in June defense counsel had said petitioner was prepared to go to trial is to ignore the entire reason why this occurred—namely, that the petitioner had then been incarcerated without bail for over three months and petitioner's only alternative to a speedy trial appeared to be to remain in prison for an indefinite period of time until the prosecution was ready to proceed (47A-157A). Finally, the fact that a change of venue was not sought can hardly be held to be a waiver of petitioner's constitutional right to a fair trial. Waivers of basic con-

stitutional rights are not to be so easily implied. *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938); *Brookhart* v. *Janis,* 384 U.S. 1, 4-8 (1966). While it may be one factor to consider in determining whether prejudice actually existed, petitioner's failure to make such a motion cannot be dispositive of the federal constitutional claim. *Stroble* v. *California,* 343 U.S. 181, 193-194 (1952). The ultimate test under the Constitution must be whether the trial was actually a fair one by due process standards. Thus in *Moore* v. *Dempsey,* 261 U.S. 86 (1923), no motion had been made for change of venue.

Moreover, the New York Court of Appeals wholly ignored the prejudicial publicity during the trial itself, when it was too late to change the venue. Even if the juror's word be accepted that although he saw the particular article but did not "read" it, his glancing at it would have been sufficient to convey its adverse tenor. Thus, the courts have given proper recognition to the fact that "the average juror" is often honestly unaware of "the unconscious influence of his preconceptions as to probable guilt", *Delaney* v. *United States,* 199 F. 2d 107, 112-113 (1st Cir. 1952), and that, even on the conscious level: "There is no certainty that all jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity." *United States* v. *Accardo,* 298 F. 2d 133, 136 (7th Cir. 1962), citing *Coppedge* v. *United States,* 272 F. 2d 504, 508 (D.C. Cir. 1959).

Conclusion

The suppression of evidence, the denial of pretrial discovery, the admission into evidence of illegally seized material, the use of a blue ribbon jury, the trial judge's statements to the jury which violated the petitioner's right of silence, and prejudicial publicity—these were the techniques by which the People unconstitutionally obtained a judgment of conviction against the petitioner. Such techniques all have become not only obsolete but also unconstitutional. The Court should grant the instant petition for a writ of certiorari; and hold that our country has a uniform system of criminal justice, applicable alike to defendants in state as well as federal criminal cases, and measured, with the exception of indictment by grand jury, by the relevant specifics of the federal Bill of Rights.

Respectfully submitted,

MILTON C. WEISMAN
O. JOHN ROGGE
1501 Broadway
New York, New York 10036
Attorneys for Petitioner

APPENDICES

APPENDIX I

Opinion of District Judge John R. Bartels

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 303—September Term, 1967.

(Argued February 9, 1968 Decided March 24, 1969.)

Docket No. 31921

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Petitioner-Appellant,

—v.—

JOHN T. DEEGAN, as Warden of Sing Sing Prison, State of New York,
Respondent-Appellee.

Before:

WATERMAN and FEINBERG, *Circuit Judges,*
and BARTELS, *District Judge.**

An appeal from an order of the United States District Court for the Southern District of New York, Palmieri, *J.*, denying appellant's motion for a writ of habeas corpus.
Affirmed.

O. JOHN ROGGE, MILTON C. WEISMAN, RICHARD SHEINBERG, ABRAHAM L. WAX, ARTHUR KELLER, Weisman, Celler, Allan, Spett & Sheinberg, New York City, *for Appellant.*

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* Of the Eastern District of New York, sitting by designation.

Appendix I

ERIC A. SEIFF, Spec. Counsel to the District Attorney, H. Richard Uviller, Asst. District Attorney, Frank S. Hogan, District Attorney, New York County, *for Appellee.*

BARTELS, *District Judge*:

Following his conviction for second degree murder in the State Supreme Court, Mark Fein, the appellant, moved for a new trial asserting a number of claims. Those raising the most serious questions are (i) the suppression by the prosecution of the name and story of Dagmar Finch Generazio; (ii) the admission into evidence, without a hearing, of a chair allegedly obtained by means of an illegal search and seizure; and (iii) the use of a Blue Ribbon Jury at appellant's trial.

After an extensive hearing[1] by the trial court (Culkin, *J.*), the motion was denied. The Appellate Division of the State Supreme Court (24 App. Div. 2d 32, 263 N.Y.S. 2d 629 (1st Dept. 1965)) unanimously affirmed both the judgment of conviction and the denial of the appellant's motion for a new trial and that decision in turn was affirmed by the Court of Appeals (Fuld, *J.*, dissenting), 18 N.Y. 2d 162, 272 N.Y.S. 2d 753 (1966). The appeal to the United States Supreme Court was dismissed for want of jurisdiction (Douglas, *J.*, dissenting) and the petition for a writ of certiorari denied. Then followed Fein's application for a writ of *habeas corpus* in the United States District Court for the Southern District of New York, which was denied

1. Gloria was not available for this hearing and there is no showing that she would be available for any other hearing.

by Judge Palmieri (*United States of America ex rel. Fein* v. *Deegan*, No. 67 Civ. 2514, S.D.N.Y. Oct. 13, 1967). In effect, we are reviewing a State court record which has been reviewed by 12 State court judges as affirmed by 11 of them.[2]

The story is a sordid one, resulting on October 10, 1963 in the murder of Rubin Markowitz, a one-time grocery clerk and bookmaker. Markowitz was last heard from by a client at 4 P.M. that same day and his death occurred after that hour.

Fein owed Markowitz $7,000, which he had lost betting against the Los Angeles Dodgers in the 1963 World Series. He made an appointment with Markowitz to pay the $7,000 and at the same time he made arrangements with a friend to pay Markowitz approximately $16,690 owed to Markowitz by that friend and another. For this purpose Fein was given $4,690 in cash and a $12,000 promissory note payable to Fein. The killing permitted Fein not only to write off his own debt but ultimately to pocket the $16,690 furnished by the friend.

The State's chief witness against Fein was Gloria Kendal, an admitted prostitute and the some time mistress of Fein. She testified that Fein telephoned her to come to his apartment (which he leased in the name of "Weissman" for his extramarital activities) between 5:30 and 5:45 P.M. on October 10, 1963. Before responding to this distress signal, Gloria left a message with another prostitute who remained in her apartment, one Sandra Ede. This message was addressed to Geraldine Boxer (Geri), whose custom

2. If we add the State trial judge and the Federal district judge, 13 judges have approved the record.

was to meet daily with Gloria for light supper before each attended their respective evening classes. Gloria then taxied the ten blocks to Fein's secret lodging. When she arrived before 6 P.M. at Fein's apartment "He was very flushed. His hair was messed, and his eyes were enormous." Fein then told her that he had shot his bookmaker Rudy and asked her to assist him in disposing of the body which he had stuffed into a steamer trunk. Gloria testified that she "saw part of an arm, and some new clothes line, and some white material that looked like a shirt." Responding to his request, Gloria called one David Broudy, an unemployed taxi cab driver (who did not know Fein), who immediately proceeded by car to the "Weissman" apartment. In the meantime Geri drove to Gloria's apartment and was directed by Sandra Ede over the intercom to proceed to the "Weissman" apartment pursuant to Gloria's instructions.

Both Broudy and Geri eventually arrived at the "Weissman" apartment. In answer to a question by Broudy, Fein stated that while he was paying his bookmaker "somebody burst in * * * shot this man and scooped up the money and left." He also told Broudy that he had lined the bottom of the trunk with "some canvas bags" to prevent blood leakage. Since the trunk would not fit into either Broudy's car or Geri's car, Fein arranged for the rental of a station wagon. After he and Gloria picked up the vehicle, Fein and Broudy loaded the trunk into it and Fein gave the keys to Broudy and departed for a dinner date with his wife and friends.

Thereafter the two women and Broudy drove the station wagon to Gloria's apartment and double parked while

Gloria entered the apartment, had a drink with Sandra Ede and obtained some money to pay Broudy for his trouble. Half an hour later she returned to the car where Broudy and Geri were waiting. Thereafter the three disposed of the trunk in the Harlem River. During the weeks that followed Gloria and Broudy, in answer to Fein's plea for help, attempted to obliterate all evidence that might have associated Fein or the crime with the "Weissman" apartment by filling and painting holes in the floor and wall, destroying the carpet and removing furniture and furnishings.

The Alleged Suppression of the Testimony of Dagmar Finch Generazio

One of the chief grounds for Fein's application for *habeas corpus* was the alleged suppression of the testimony of one Dagmar Finch Generazio (Dagmar), a prostitute associate of Gloria, which Fein claims to be exculpatory. There are two phases of Dagmar's testimony, the first relates to an alleged phone call from Gloria to Dagmar and the story Dagmar told the prosecutor pertaining to that call, and the second relates to Gloria's second recantation on September 28, 1964, three weeks before the trial. Dagmar's post-trial testimony was to the effect that Gloria had telephoned her on the day of the murder[3] before 4 P.M. at Gail Weiner Tracy's apartment on 64th Street, where she was living at the time. In this conversation Gloria tried to induce Dagmar to assist her in finding a car to move a heavy box but was unsuccessful. The defense claims that

3. As a matter of fact, the prosecutor and the detective testified that she said the phone call was made in late September or early October.

the testimony of this telephone call before 4 P.M. would have been not only damaging to Gloria's credibility but might have suggested that Gloria, rather than Fein, was responsible for the murder.

Dagmar's estranged husband corroborated his wife's account to the police by testifying at the hearing that his wife had said to the detectives that the call was "in the afternoon of October, this particular time * * * She did say it was in the afternoon." Gail Tracy testified that the phone call was made shortly after 3 P.M. But prior to this testimony at the hearing Gail testified that she had called Dagmar a liar when Dagmar stated that such a phone call had been made because, according to Gail, Dagmar had not been in Gail's house for six or seven months. She also admitted that, except on one post-trial occasion, she had flatly denied the occurrence of any such call and did so on one occasion in Dagmar's presence.

Both Assistant District Attorney Vincent Dermody and Detective Leman testified that Dagmar had never said that the telephone call was made earlier than between 6 and 7 o'clock. At one time she told Detective Leman that "maybe it was eight o'clock or nine o'clock." In an effort to fix the time more precisely she said "All I know is that it was dark out, and when I entered the building the dry cleaning man was getting ready to close his store." On a second visit to the District Attorney's office, Dagmar related in front of Gail Tracy the story of receiving a phone call at her house some time after or between 6 and 7 P.M. Gail Tracy called Dagmar a liar stating that Dagmar never received a call on Gail's telephone at any time.

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In his decision on the post-trial motion, the state trial judge rejected Dagmar's testimony as well as that of her husband and of Gail Tracy as being unworthy of belief, and denied the motion for a new trial. As to Dagmar, the judge specifically found as follows:

> "Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gail Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on belaf of the defendant, upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call *on any afternoon.* I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief." (Emphasis added.)

The state judge, after hearing all the witnesses, thus found that Dagmar never told the prosecutor of a call received between 3 and 4 P.M.

In *United States* v. *Johnson,* 327 U. S. 106 (1946), the Supreme Court held that it was not the province of a federal court of appeals in reviewing orders granting or denying motions for a new trial, to intervene on the ground of erroneous findings of fact unless it clearly appears that

such findings are unsupported by any evidence. As the court observed (p. 113):

> "While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial."

Where the State court has made a full and fair evidentiary hearing with express findings of fact, the district court may "and ordinarily should, accept the facts as found in the hearing" (*Townsend* v. *Sain,* 372 U. S. 293, 318 (1963); see, *Midgett* v. *Warden, Maryland State Penitentiary,* 329 F. 2d 185 (4th Cir. 1964); *Durham* v. *Haynes,* 258 F. Supp. 452 (E. D. Mo., N. D. 1966), *aff'd,* 368 F. 2d 989 (8th Cir. 1966), *cert denied,* 390 U. S. 959 (1968)). This principle was codified in 28 U. S. C. A. §2254(d), which provides that the determination of fact of the State court in a *habeas corpus* proceeding, subject to certain other provisos not here present, "shall be presumed to be correct," unless the "factual determination is not fairly supported by the record." Since we do not believe that it can be said that the findings of the State court are not fairly supported by the record and since that hearing was full and fair, we must, therefore, accept at least the finding that Dagmar "never told the prosecution of receiving a call on any afternoon." The State also argues with force that since the State judge

also found incredible Dagmar's story that she received *any* call from Gloria on the day of the killing, that should end this phase of the appeal. However, Fein points out that the prosecutor conceded that Dagmar made a statement to him of a 6 to 7 P.M. telephone call, which is not in the "afteronon." While this is not a concession that Dagmar actually did receive a call, it does bear on the prosecutor's state of mind and his alleged "unfairness."

We turn then to the assumption that Dagmar did tell the prosecutor of a 6 to 7 P.M. telephone call. It is argued that such information was vitally material to the defense because from such a call the jury could draw an inference damaging to Gloria. The prosecution witnesses testified that when Broudy, Geri and Gloria drove the station wagon containing the trunk from the "Weissman" apartment, they stopped at Gloria's apartment between 6 and 7 P.M. Fein suggests that had the prosecutor disclosed that he had evidence indicating that Gloria had, at the time she went upstairs to her own apartment, telephoned Dagmar in an attempt to borrow a car to remove a box, the jury might have inferred that the decedent's body was not in the trunk at all but was elsewhere awaiting removal; thus the entire substance of Gloria's story that it was at Fein's request that she had become involved in disposing of the body of the man murdered in the "Weissman" apartment was false. A major difficulty with this theory is that there is no evidence from any witness that Markowitz's body was anywhere except in the station wagon trunk at the time. Broudy testified that Fein said that the body was in the trunk, Gloria testified that she had seen the body in the

trunk, and Broudy and Gloria testified that they helped Fein to remove the damaging evidence from the "Weissman" apartment. Moreover, it was reasonable for the prosecution to conclude that there was no major inconsistency between Gloria's account and Dagmar's statement that Gloria made a phone call to Dagmar between 6 and 7 P.M., because the call could have been made by Gloria from the "Weissman" apartment (rather than from Gloria's apartment) at the same time Gloria called Broudy (which was around 6 P.M.) in her effort to get a car to remove the trunk. From the record it appears that the prosecutor had reason to feel unsure as to whether Dagmar was telling the truth. Dagmar had mentioned that she received a call from Gloria while at Gail Tracy's apartment, but Mrs. Tracy had denied this to the prosecution before the trial. It is true that Dagmar's statement might have been used to attack Gloria's credibility but, as indicated below, defense counsel was adequately armed at trial and attacked her credibility thoroughly. Under all the circumstances, even giving credence to Dagmar's statement that she had informed the prosecution about a phone call between 6 and 7 P.M. does not vest it with the materiality essential to a finding of prosecutorial suppression.

The second phase of Dagmar's potential testimony, allegedly suppressed, involved Gloria's second recantation on September 28th. Dagmar testified that Gloria had twice asked her to "stick with me." Finally there was a confrontation between Dagmar and Gloria at the District Attorney's office when Dagmar related the story that Gloria had called Dagmar at Gail's apartment between 6 and 7

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P.M. Gloria denied the call and began screaming and yelling that Detective Leman was trying to induce people to lie about her. Detective Leman escorted Dagmar from the room and Gloria demanded to see her lawyer. After Dagmar and Leman left, Gloria recanted her story for the second time, only to return to the original story given at the trial. The prosecutor advised defense counsel of both recantations but not of the confrontation with Dagmar prior to the recantation. In their testimony neither Gloria nor Detective Leman mentioned Dagmar's presence at the meeting prior to the recantation. Based upon these circumstances, the defense has accused the prosecution of countenancing false testimony.

Gloria and Detective Leman had conflicting explanations at the trial of the case as to the cause of the second recantation. In each case their testimony was predicated upon their respective opinions as to the cause. It cannot be said whether either was right or wrong. In all events, Dagmar was not present at the time of the recantation although she was present at the meeting. The questions posed by the defense itself were ambiguous. The Appellate Division held that who was present at the interview was not emphasized and the question did not clearly indicate that presence at the interview rather than presence at the time of recantation, was the information sought. The Court of Appeals held that the record amply sustained the lower court's finding that the testimony was not in fact false or perjurious. We are compelled to agree. The record discloses that materiality of Dagmar's confrontation under the

circumstances is highly speculative and fails to reveal any evidence of its suppression.

Dagmar's testimony did not bear directly upon the guilt or punishment of Fein. At most, it pertained to Gloria's credibility, provided one could bridge the gap of Dagmar's incredibility. Gloria's credibility, however, had been relentlessly attacked by an exhausting and punishing cross-examination in which her recantations and background were thoroughly explored. Even the prosecutor in his summation described her, among other things, as "notorious," "a moral leper," and "an old whore." Nevertheless, the jury believed enough of Gloria's testimony, as corroborated by Broudy and Geri, to convict Fein.

Fein claims that he made a request to the prosecutor for Dagmar's whereabouts, which poses the question of prosecutorial suppression. It is admitted that during the course of the trial the defense was aware that Dagmar had told the prosecutor that she had received a phone call from Gloria on the murder day in an attempt to borrow a car. In fact, the defense counsel knew about Dagmar, as appears from his cross-examination of Geri Boxer, when he inquired as to Geri's acquaintanceship with Dagmar. In a hallway conversation during the trial, William J. Whelan, defendant's investigator and a former policeman, informed Detective Leman that the defendant knew of the phone call and asked whether the prosecutor was going to place Dagmar on the stand, to which Detective Leman replied that he did not know. When Detective Leman asked Whelan if the latter had called Dagmar's mother in Baltimore, Whelan requested the mother's phone number,

to which Detective Leman replied "I am not at liberty to give it to you." Whelan stated that he "did not expect that he would give it to me." In other words, Whelan as a former policeman knew that the request was not made to the proper source and that a detective ordinarily is not at liberty to furnish information to the defense without the authority of the prosecutor. Yet the defense neither pursued the matter nor made an application to the court for Dagmar's whereabouts. Mr. Blinder, one of the defendant's counsel, stated at the post-trial hearing that he did not pursue the matter because he believed that if Dagmar were important to the defendant's case, the prosecutor would inform him of that relevance.

The Court of Appeals found that there was not only no request for Dagmar's full name, address or telephone number but also no indication that the defense could not locate her. If the request was to flag the importance of the evidence for the defense and accordingly impose upon the prosecutor a duty to make a careful check of his files, it was not too much to require that such request be made to someone in authority rather than to a police detective whom the defendant's own investigator did not believe would supply the information.

In *United States* v. *Keogh*, 391 F. 2d 138 (2d Cir. 1968), Judge Friendly classified the law as to prosecutorial suppression of evidence into three categories: (1) deliberate bad faith suppression for the very purpose of obstructing the defense, or the intentional failure to disclose evidence whose high probative value to the defense could not have escaped the prosecutor's attention; (2) deliberate refusal to honor a request for evidence where the evidence is ma-

terial to guilt or punishment, irrespective of the prosecutor's good faith or bad faith in refusing the request; and (3) where suppression was not deliberate and no request for evidence was made, but where hindsight discloses that it was so material that the defense could have put the evidence to not insignificant use (pp. 146-148). The best that can be said for appellant's point is that the action of the prosecutor in this case arguably fell within the second category of a deliberate refusal to honor a request for evidence that is material to guilt or punishment. But in our view, it would be unfair and inequitable to charge the prosecutor with the responsibility for any oral request which was made by an employee of the defendant, such as an investigator, to an employee of the prosecutor, such as a detective. Aside from that failure, we find it hard to evaluate Dagmar's testimony as material. The third category set forth in *Keogh* refers to an unintentional suppression of evidence without a request where the evidence was so material that "the defense could have put the evidence to not insignificant use." But in those cases "the standard of materiality must be considerably higher." As Judge Friendly remarked (p. 148): "To invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties." Dagmar's testimony was peripheral in nature and only obliquely affected Gloria's credibility. To say the least, it is doubtful whether such evidence satisfied the standard of materiality required by the second category. Certainly it did not satisfy the standard of materiality in the third category. It seems to us

that no stretching can force the testimony of Dagmar into the factual pattern of prosecutorial suppression of material evidence, condemned in *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842 (4th Cir. 1964).

It is appropriate to note that upon an application for a new trial based upon newly discovered evidence, due diligence is an essential factor. See, New York Code of Criminal Procedure, §465(7) and cases cited thereunder; see also, *United States* v. *Costello*, 255 F. 2d 876 (2d Cir. 1958), *cert. denied*, 357 U.S. 937 (1958), *reh. denied*, 358 U.S. 858 (1958); *Kyle* v. *United States*, 297 F. 2d 507 (2d Cir. 1961), *cert. denied*, 377 U.S. 909 (1964); *United States* v. *Capece*, 287 F. 2d 537 (2d Cir. 1961), *cert. denied*, 368 U.S. 847 (1961); *United States* v. *Lombardozzi*, 343 F. 2d 127 (2d Cir. 1965), *cert. denied*, 381 U.S. 938 (1965). And such application will not be granted if the evidence is merely impeaching. *People* v. *Eng Hing and Lee Dock*, 212 N.Y. 373, 386, 106 N. E. 96 (1914); *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *United States* v. *Aguillar*, 387 F. 2d 625 (2d Cir. 1967). To relieve the defendant of his duty of due diligence, the evidence of prosecutorial suppression should be clear and unequivocal. A half-hearted and casual inquiry made by one subordinate to another subordinate should not shift the responsibility to the prosecutor. The prosecutor made many disclosures to the defense and there is nothing in the record which suggests that his conduct, as well as that of his staff, under difficult circumstances did not amply satisfy the fundamental concepts of due process necessary in order to provide the defendant with a fair trial.

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The Admission into Evidence of the Chair

The second relevant ground for Fein's complaint is the admission into evidence of a chair containing a speck of blood, allegedly seized in violation of the Fourth and Fourteenth Amendments. When the prosecutor offered the chair for identification, the defense counsel objected at the bench in these words:

> "If this furniture purports to be furniture that was in the apartment, Apartment 5-B, which is the apartment in question over here; and if that apartment was entered into without a search warrant; or in the alternative, since we have already heard some furniture had been stored in some furniture storage warehouse, if this furniture had been secured from this furniture storage warehouse without the proper legal warrant or proper legal authorization, I object to it; and I shall move to suppress this evidence."

The chair was marked for identification upon the condition that the defense was not deemed to have waived its right to question the legality of the evidence on a motion to suppress later. Eight days later, during direct examination, Gloria testified that Fein had requested her to remove all the furniture, including the chair, from the 63rd Street apartment, saying: "Get rid of all the furniture in the apartment now, and get rid of the rug; get rid of everything." Gloria placed the chair in a storage warehouse under a pseudonym. The chair was received in evidence over the general objection by the defense, counsel reminding the court of a discussion about the chair at the bench a few weeks prior thereto. The trial court stated: "Yes, I am familiar with that; but under the testimony here, the objection is overruled."

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At the post-trial hearing the State court stated that there was no evidence to support the counsel's objection that the chair was illegally seized. It added that after the witnesses for the prosecution testified, the defense did not seek a *voir dire* upon the ground of illegal search and seizure and it accordingly found that the chair had been abandoned by the defendant. The Appellate Division stated that the speck of blood on the chair was so small that it could not be typed and that the chair could be disregarded as proof that the homicide took place in the apartment. The Court of Appeals found that the defendant abandoned his interest and retained no rights in the chair which could be breached by an illegal seizure. The District Court found that the police had procured the chair stored in a warehouse in the name of "Weissman" without a search warrant, but that Fein had given Gloria authority to dispose of the chair and had abandoned it just as if he had thrown it in a public wastepaper basket.

Defendant claims that he was deprived of his fundamental constitutional rights under the authority of *Jackson* v. *Denno,* 378 U.S. 368 (1964), because he was denied a hearing under the New York Code of Criminal Procedure §813-c in the absence of the jury upon the issue of abandonment. The particular facts in this case do not pose the attack upon the rights of the accused presented in *Jackson* v. *Denno, supra.* Assuming that Fein had properly preserved his right under §813-c of the New York Code of Criminal Procedure, the court was justified in proceeding without such a hearing. Defense counsel's objection was based upon an "if" but that "if" was rendered meaningless by Gloria's subsequent testimony.

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While the right to a suppression hearing is not a technical device or a narrow procedural requirement, nevertheless it is a right that must be asserted upon unambiguous grounds. Although the chair was taken by a warrantless search from the warehouse, counsel for Fein knew, after eight days of testimony, that if Fein had any right to a separate suppression hearing, it would have to be asserted upon the ground that Fein had a property interest in the chair. Counsel was an experienced and skillful defense attorney and he knew how to focus attention upon his client's rights. Instead of making a claim of property interest in the chair to the court (which he could have asserted outside of the hearing of the jury), he was content to rely upon his earlier objection of an illegal search and seizure predicated upon the hypothesis that the chair was in the "Weissman" apartment at the time of the search which he knew at the time of the second objection was not the fact. It was then his duty to come forward with an assertion of some specifics to show that he had a standing to demand a §813-c hearing. This he did not do. Under such circumstances, he cannot wait until after the trial and then claim that he was deprived of his rights. *Cohen* v. *United States,* 378 F. 2d 751 (9th Cir. 1967), *cert. denied,* 389 U.S. 897 (1967); *United States* v. *Phillips,* 375 F. 2d 75 (7th Cir. 1967), *cert. denied,* 389 U.S. 834 (1967); *People* v. *Solimine,* 18 N.Y. 2d 477, 223 N.E. 2d 341, 276 N.Y.S. 2d 882 (1966); *People* v. *Estrada,* 28 A. D. 2d 681, 280 N.Y.S. 2d 825 (2d Dept. 1967); *People* v. *DeVivo,* 23 A. D. 2d 793, 258 N.Y.S. 2d 1013 (1st Dept. 1965); *People* v. *Childers,* 54 Misc. 2d 752, 283 N.Y.S. 2d 336 (Sup. Ct. 1967). Fein will not be heard to claim prejudice from the use of evidence arising from a search

and seizure in violation of the constitutional right of either Gloria or the warehouseman. *Jones* v. *United States*, 362 U.S. 257 (1960); *Abel* v. *United States*, 362 U.S. 217 (1960), *reh. denied*, 362 U.S. 984 (1960); *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Masterson*, 383 F. 2d 610 (2d Cir. 1967), *cert. denied*, 390 U.S. 954 (1968), *reh. denied*, 391 U.S. 909 (1968). One is compelled to infer that Fein's counsel failed to properly move at the trial not only because the evidence indicated that the chair had been abandoned and the result of his application would have been fruitless, but also because Gloria's damaging testimony with respect to the chair was at all events admissible, even though the chair might have been inadmissible.

The Challenges to the Blue Ribbon Jury

The final serious question presented by this appeal involves a double-barreled attack on the special jury convened by the trial court under the New York blue ribbon jury statute, former New York Judiciary Law §749-aa, repealed 1965 New York Laws ch. 778, §3. First Fein urges that New York's blue ribbon jury statute was unconstitutional because it resulted in a significant overrepresentation of persons from higher income groups with a corresponding underrepresentation of those from lower income groups. The argument that Fein was thus convicted by an unrepresentative jury presents difficult issues. The analogy is drawn to *Whitus* v. *Georgia*, 385 U.S. 545 (1967), and *Jones* v. *Georgia*, 389 U.S. 24 (1967), where a demonstration that members of a racial group were significantly underrepresented on grand and petit juries was enough to

make out a prima facie case of intentional discrimination and a denial of due process and of the equal protection of the laws. Those cases may be distinguishable but, in any event, it is more significant that what we are in effect being asked to do here is to overrule the decisions of the Supreme Court, sustaining by 5-4 vote the blue ribbon jury against constitutional attack, in *Moore* v. *New York,* 333 U.S. 565 (1948), and *Fay* v. *New York,* 332 U.S. 261 (1947), although that Court has not done so yet,[4] and even though the New York blue ribbon jury statute is no longer in effect. It is urged that those decisions would have been different had the Court then considered that the Sixth Amendment applied to the State; however, we believe that we are bound by these decisions until such time as the Court informs us that we are not.

In his reply brief, Fein for the first time also argues that the blue ribbon jury statute was unconstitutional on its face because its object was

> ". . . to effect the exclusion . . . of all those individuals who had conscientious scruples against capital punishment . . . Thus this statute assured the state of a jury whose members were partial to the prosecutor on the issue of guilt or innocence."

This argument in Fein's reply brief came after (and no doubt in light of) the grant of certiorari by the Supreme Court in *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968). In that case the Court held unconstitutional the imposition of the death penalty in cases where persons with scruples against capital punishment were excluded from jury serv-

4. In our own court, we would be overruling *Vanderwyde* v. *Denno,* 113 F. Supp. 918 (S. D. N. Y. 1953), *aff'd per curiam,* 210 F. 2d 105 (2d Cir.), *cert. denied,* 347 U. S. 949 (1954).

ice, a holding explicitly limited to death penalty cases and then only to sentence rather than conviction. *Id.* at 522-23 n. 21; see *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968). The Court in *Witherspoon* did consider the argument that exclusion of jurors with scruples against capital punishment precludes an impartial trial on the issue of guilt. The majority there said, *id.* at 517-18:

> "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction."[5]

While it is true that *Witherspoon* does hint, as the dissenters note, *id.* at 539, that the law may change on a different record, the studies and reports cited to us are the same as those cited to the Court in *Witherspoon* and *Bumper*. Thus, a different result could not be supported on the present law. However, we do not even reach the question. As pointed out above, this part of the challenge to the blue ribbon jury statute was first made in this court. Consequently, there was not only no opportunity for the district court to evaluate the question, but Fein apparently has not exhausted his State court remedies by first making the argument raised here to the New York State courts. In these circumstances, we should refuse to pass on the

5. Subsequently, the Court in *Bounds* v. *Crawford*, 37 U. S. L. W. 3150 (U. S. Oct. 21, 1968), vacated the judgment in *Crawford* v. *Bounds*, 395 F. 2d 297 (4th Cir. 1968) (*in banc*), which had accepted the argument urged to us, and remanded for reconsideration in light of *Witherspoon*.

claim without prejudice to Fein's subsequently making it to the State courts.

Appellant also claims that he is entitled to reversal because of other alleged prosecutorial suppression of evidence, denial of pretrial discovery and inspection, the effect of publicity, and certain statements made by the trial judge to the jury. These contentions were discussed and found to be without merit by Judge Palmieri in his opinion predicated upon the petition for the writ and the motion for a certificate of probable cause. We subscribe to his conclusions.

Upon the examination of the State court record, we find no violation of Fein's right to due process and a fair trial. Accordingly, we affirm the District Court's denial of the writ.

Judgment affirmed.

APPENDIX II

Concurring Opinion of Circuit Judge Waterman

WATERMAN, *Circuit Judge* (concurring):

I find the dissenting opinion of Chief Judge Fuld of the New York Court of Appeals, 18 N. Y. 2d 162, 177, 272 N. Y. S. 2d 753, 763 (1966), most persuasive. I, with him, believe that it is possible that the jury might have reached a different verdict if the testimony Dagmar Generazio gave at the post-trial hearing had been presented at the trial. Nevertheless, I recognize that petitioner was convicted in the New York state courts and not as a result of a federal prosecution, and as we are not therefore writing upon a clean slate I am willing to concur in the affirmance of the decision below.

It appears that before the state felony trial the defense knew of Dagmar's existence and of the possible importance of her testimony. The defense, despite this knowledge, did not exert itself to seek her out and interview her. This failure on its part to exercise a reasonable diligence in trial preparation should bar us in this collateral proceeding from ordering petitioner's release or ordering the grant of a new trial based upon truly newly discovered suppressed exculpatory evidence.

Even though the office of the prosecutor was in constant touch with Dagmar during crucial days of investigation and trial as shown by the records of the telephone company, I would not go so far as to hold that this interrogative surveillance requires us to overturn this state court conviction upon a consideration of likely inferences that may be drawn

from Dagmar's post-trial testimony. I agree with my brothers that we should not hold that there was a New York state prosecutorial suppression here; the defense was not unaware of Dagmar; she was not deliberately made unavailable to the defense; and no specific request was made by defense counsel for a direct lead to her whereabouts.

APPENDIX III

Opinion and Order of United States District Judge Edmund L. Palmieri, October 13, 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 2514

UNITED STATES OF AMERICA ex rel. MARK FEIN,

Relator,

against

JOHN T. DEEGAN, AS WARDEN OF SING SING PRISON, STATE OF NEW YORK,

Respondent.

Appearances

HENRY ROTHBLATT, Esq. and
F. LEE BAILEY, Esq.
507 East 161st Street
Bronx, New York 10451
Attorneys for Relator Mark Fein

HON. FRANK S. HOGAN
District Attorney, New York County
155 Leonard Street
New York, New York

ERIC A. SEIFF, Esq.
Assistant District Attorney
Of Counsel

Appendix III

PALMIERI, J.

This is a petition for a writ of habeas corpus by a state prisoner who was convicted on November 25, 1964, of murder in the second degree in the death of Rubin Markowitz and sentenced on May 26, 1965, to a prison term of thiry years to life. All remedies at the State level have been exhausted by petitioner. The trial court held a hearing of 16 days duration on a motion for a new trial which resulted in a denial of relief. (See opinion of Culkin, J., Record at pp. 3894-3913.)[1] In addition, the appellate courts of the State of New York have closely scrutinized the case. 24 App. Div. 2d 32 (1st Dep't 1965), 18 N.Y. 2d 162 (1966). Petitioner's application for a writ of certiorari was denied by the Supreme Court, 386 U.S. 978 (1967).

The petition alleges that the petitioner was denied the due process of law because: (1) the prosecution suppressed evidence favorable to the defense and knowingly used testimony that was false, incomplete, misleading and inaccurate; (2) publicity surrounding this indictment and trial resulted in an unfair trial; (3) evidence procured by an unlawful search and seizure was used against him over objection and without a hearing on its admissibility; (4) the court denied a pretrial motion for examination of the bullets found in the deceased's body and (5) a special (Blue Ribbon) jury under former Section 749aa of the Judiciary Law of New York was used to try his case.

The body of Rubin Markowitz was found floating in the Harlem River in the early morning of November 8,

1. References to the record are to the record on appeal to the Appellate Division, First Department, and the pagination is that on the bottom of the pages.

1963. Markowitz had last been seen by his family on the morning of October 10, 1963, and by associates at 4:00 p.m. the same day. Markowitz was a part-time grocery clerk whose main activity however, was illegal and covert—that of booking bets. His customers were assigned fictitious names which, along with telephone numbers, were used in the placing of bets. On such name was "Shore", the related telephone number being that of Carmela Lazarus, an admitted prostitute and mistress of the petitioner[2] (hereinafter called Gloria Kendall [Gloria], the alias by which she was known during the period relevant to this case). It was through Gloria that the police learned of the petitioner's existence.

The State's case was essentially this. Gloria testified that the defendant telephoned her on October 10, 1963, at about 5:30 o'clock in the evening, urgently requesting her to come to his "bachelor" apartment at 406 East 63rd Street, New York City. She reluctantly complied and when she arrived he told her he had killed his bookie[3] and exhibited the body in a trunk. At his behest she procured two of her friends, a Mr. Broudy and a Miss Boxer, to help dispose of the trunk. Petitioner arranged for the rental of a station wagon automobile, but stayed behind as Gloria and her two friends disposed of the trunk by dropping it into the Harlem River. Miss Boxer and Mr. Broudy testified to their part in the disposal of the body.

The various contentions made by petitioner before this Court will now be discussed seriatim.

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2. Pp. 1113-1118.

3. Petitioner owed the deceased $7,000 as a result of his losing bet on the Los Angeles Dodgers in the 1963 World Series (p. 563).

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Suppression of Evidence

Petitioner alleges that the prosecution concealed exculpatory testimony in three instances.

The first concerns Miss Sandra Ede (hereinafter Sandra), a friend of Gloria who spent a good deal of time at her apartment. Gloria testified that Sandra was at her apartment when petitioner called. As she was expecting Miss Boxer at the time she left a message for her with Sandra to go to petitioner's 63rd Street apartment. Miss Boxer testified that when she arrived at Gloria's apartment house she called on the intercom and Sandra gave her the message.

At the post-trial hearing it was established that the district attorney interviewed Sandra and she refused to testify. She stated that if called she would testify that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone. The defense was furnished with her name and address but it is claimed that the full extent of her interview was not revealed. It appears from the cross-examination of Miss Boxer, however, that the defense was, in fact, aware of Sandra's potential testimony (pp. 780-86).

The second instance concerns information of Mrs. Bennett and her mother, Mrs. McNair, two tenants of the apartment building in which the murder occurred. They occupied an apartment in the rear of the building whereas the petitioner's was in the front. They told the police

that they heard shots which they believed emanated from below their windows in the rear of the building. The defense interviewed these women several times prior to the trial but it claims they never revealed this information. It also appears that one of defense counsel dated Mrs. Bennett during this period.

The third concerns Mrs. Dagmar Generazio (hereinafter Dagmar), a prostitute associate of Gloria.[4] She told the prosecution that on the day of the murder she had received a telephone call from Gloria during which she asked for assistance in finding a car to move a heavy trunk. Dagmar placed this call at various times from 3:00 to about 7:00 o'clock in the evening. She testified at the post-trial hearing that she received it at 4:00 o'clock in the afternoon. Gloria never testified to making this call. The defense contends that such testimony would have had a damaging effect on Gloria's credibility, perhaps giving rise to an inference that she was involved in the crime before the victim's death as well as after it.

There also was testimony by Dagmar, at the post-trial hearing, to the effect that twice Gloria had asked her to "stick with her" (p. 2588). Finally there was a confrontation between the two women at the district attorney's office during which Gloria yelled at Dagmar and called her a "goddam liar" (p. 3362). The same day—the record does not make clear precisely how long it was after Dagmar left—Gloria recanted her story, only to recant again two days later to return to her original story—the one given at the trial and summarized above. The

4. Pp. 345-347.

prosecutor told defense counsel of both recantations[5] but not of the confrontation with Dagmar.

The defense was aware of the existence of Dagmar, although it knew her by her maiden name Dagmar Finch and did not know she had moved from New York to New Jersey. During the trial one of defense counsel's investigators asked one of the detectives assigned to the case for her address. He replied that he was not at liberty to disclose it. The defense did not pursue the matter further. No request was made of the district attorney nor was any motion addressed to the court. The investigator had told counsel that there was a witness who claimed she had received a call from Gloria to borrow a car (p. 3004), and before the trial was over counsel learned her name was Dagmar Finch. It is apparent that the defense made no effort to pursue the possible use of Dagmar as a witness at the trial.

The question posed by the petitioner before this Court is substantially the following: whether the prosecution violated petitioner's right to a fair trial under the due process clause of the Fourteenth Amendment and contravened the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963) by failing to turn over to the defense an account of the three episodes above discussed.

The instances petitioner cites do not amount to a violation of his rights by the prosecutor. Certainly no mis-

5. At the close of Gloria's direct testimony the prosecutor called defense counsel to the bench and there made a statement for the record that twice in the course of his investigation Gloria recanted her testimony about hearing the petitioner admit the shooting and seeing the body in the trunk. The first recantation does not concern us as no question was raised with respect to it in these proceedings.

conduct can be found in the handling of the bullets or the Bennett-McNair information as the defense had access to both. The prosecution's behavior in respect of Dagmar is similarly free from constitutional infirmity. The defense knew of her existence and of her possible usefulness as a witness. Yet no attempt, beyond that of the defense investigator, was made to get her name and address from the prosecution.

The doctrine of *Brady v. Maryland, supra,* does not require the disclosure of such testimony. The *Brady* rule is that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. 83, at 87.

There is no requirement that the prosecution be the guardian of every possible avenue of investigation available to the defense. Even assuming that a defense request is not always necessary, not every lead or story need be turned over. In *Brady,* the concealed evidence was an extra-judicial statement by the accused's companion, in which he admitted that he had committed the murder for which they were both being tried. This evidence was clearly material to the sentence as the jury was empowered to restrict the punishment to life in prison.[6] In his summation Brady's counsel's sole request was for just such a limitation.

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6. Also, under the Maryland State Constitution Art. XV, §5, the jury in a criminal case are "The Judges of Law, as well as of fact."

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In *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842 (4th Cir. 1964), the suppressed evidence was a ballistics report and fingerprint tests which indicated that the accused's gun, which was marked for identification and waived before the jury although it was not admitted into evidence, was not the murder weapon. In *Application of Kapatos,* 208 F. Supp. 883 (S.D.N.Y. 1962), quoted with approval in *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135, 139-40 (2d Cir. 1964), this court found a violation when the prosecution suppressed the testimony of a witness who saw two persons, neither of whom was the accused, escaping from the scene of the crime immediately after he had heard shots. In each of these cases the court found that the concept of due process and fair play had been contravened.

The testimony of Dagmar is not of the same order. Firstly, it relates to the case in only an oblique way, going to Gloria's credibility. Gloria was subjected at the trial to the most exhaustive and punishing cross-examination in which her recantations and her sordid background were thoroughly explored. It does not bear directly upon the guilt or punishment of the petitioner. It does not exculpate the accused as did the evidence in the cases just discussed. Secondly, the district attorney's office felt unsure as to whether Dagmar was telling them the truth (p. 3462). The trial court, in fact, after hearing her testify at the post-trial hearing found her "totally unworthy of belief" (p. 3907). In addition, the police had interviewed a Gail Weiner Tracy. Dagmar said that she received the call from Gloria while at Mrs. Tracy's apartment. Mrs. Tracy denied this when she talked to the prosecution before trial (pp. 1239-

41). However, at the post-trial hearing she testified that she did, in fact, remember Dagmar's receiving the call (p. 1242). The trial court found her unworthy of belief (pp. 3912-13).

I find nothing improper in the prosecution's actions. Due process of law does not require the prosecutor to hold himself accountable to the defense on peripheral matters which he has good cause to believe are untrue, merely because they could conceivably be of some help to the defense. This is particularly applicable in this case where the burdens of the prosecution were heavy, and the myriad aspects of the circumstantial evidence of the crime presented almost infinite possibilities of factual conflicts. Moreover the prosecution would have been justified in rejecting the story as useless since the story Dagmar told until the post-trial hearing was that the call came after 6:00 o'clock. This presented no inconsistency with the prosecution's case.

PUBLICITY

Petitioner alleges that he was denied a fair trial because of publicity surrounding his arrest and trial. The publicity complained of, however, is not of the same order as that in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1965), *Estes* v. *Texas*, 381 U.S. 532 (1964), and *Irvin* v. *Dowd*, 366 U.S. 717 (1960). It consisted of several newspaper stories at the time of petitioner's arrest, eight months before his trial, two articles in detective magazines in June, four months before trial, and a column in the New York Herald Tribune during the trial.

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There was no sustained level of publicity here as there was in the above-cited cases, the bulk of the publicity complained of having taken place fully eight months before petitioner stod trial. See *United States* v. *Miller*, F.2d (2d Cir. 1967). Counsel for petitioner, in effect, conceded this at the hearing on this petition.[7] Defense counsel, who was well aware of the publicity, was able to say, during a hearing on June 12, 1964, after petitioner by a habeas corpus petition moved for an immediate trial, "time has passed since then [the time of the bulk of the publicity]. We are willing to go to trial now."[8] Further, petitioner never moved for a change of venue.[9]

Petitioner was accorded a fair trial. Unlike the *Sheppard* case, the trial judge exercised appropriate control of the courtroom and of the jury. He repeatedly admonished the jury to avoid contact with any publicity concerning the case. When defense counsel brought the Herald Tribune column to his attention during the trial he immediately conducted a voir dire examination of the entire jury. This revealed that only one juror had ever seen the article and that he had not read it. No request was made by defense counsel to replace this juror with an alternate. There is no evidence that the jurors who heard this case were preju-

7. Minutes of hearing on this application, pp. 58-59.

8. Petitioner argues that this was due to the fact that he was in jail without bail and had been awaiting trial for three months at that time. Yet when out on bail after this hearing he did not move for a continuance.

9. This is not to say that the failure to request a change in venue is a waiver of one's constitutional claims. The lack of such a request is, rather, an indication that counsel did not view the pressure of publicity as did counsel in *Sheppard, Estes* and *Irvin*.

diced. This is not a case like *Irvin*, where "continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of" the community. *Irvin* v. *Dowd, supra,* at 726.

A balance must be kept between the public's right to be informed of public proceedings and the accused's right to a fair trial. Vigilance against the secret trial must be balanced with vigilance against the televised trial. The trial of this petitioner was clearly within constitutional bounds.

SEARCH AND SEIZURE

Petitioner has alleged that he was denied the due process of law by the trial court's failure to accord him a hearing on the question of the admissibility of what petitioner characterizes as the "fruits of an unlawful search and seizure" and its admission into evidence over defense counsel's objection. The evidence in question is a chair which had been in petitioner's 63rd Street apartment the day of the murder and on which there was a minute trace of blood the source of which was not ascertainable. The police procured the chair, without a search warrant, from a warehouse at which Gloria had stored it, using a pseudonym. She testified that petitioner had told her, "Get rid of all the furniture in the apartment, and get rid of the rug; get rid of everything." (P. 1169). It seems that Gloria, with Mr. Broudy's help, did, in fact, dispose of the rug. (P. 1170). Petitioner was insistent that she quickly dispose of all the furniture, and when she was proceeding too slowly he said, apparently to prod her, "Just get rid of it. I don't care what you do with it." (P. 1174). In the process Gloria

gave a television set to Broudy (p. 1175) and stored the rest of the furniture (pp. 1174-75).

Even assuming the claim was properly preserved, as did the New York Court of Appeals, 18 N.Y.2d 162, 169, petitioner has no standing to assert the violation of any constitutional rights as to this seizure. To have standing "the movant [must] claim either to have owned or possessed the seized property or to have an interest in the premises searched." *Jones* v. *United States,* 362 U.S. 257, 261 (1960). "[T]he rule [is] that the fact that evidence has been seized from A in violation of A's rights does not prevent its admission in a prosecution of B." *United States* v. *Granello,* 243 F. Supp. 325, 327 (S.D.N.Y. 1965) (relating the rule in *United States* v. *Wong Sun,* 371 U.S. 471 [1963]), *aff'd,* 365 F.2d 990 (2d Cir. 1766). See also, *United States* v. *Bozza,* 365 F.2d 206, 222-23 (2d Cir. 1966) and *Staples* v. *United States,* 320 F.2d 817, 820-21 (5th Cir. 1963). Petitioner's right to privacy under the Fourth and Fourteenth Amendments to the United States Constitution was not invaded. That he had no interest in the stored furniture is made clear by the fact that Gloria threw away the rug and gave the television set to Broudy. It appears abundantly clear that the last thing petitioner wanted was a possessory interest in these articles, or any connection with them. Petitioner cannot now complain of this seizure since Gloria had petitioner's authority to dispose of the chair.

Even were petitioner to have standing, relief would have to be denied. Petitioner had abandoned the property, as much as if he had thrown it into a public wastepaper

basket.[10] There is nothing unlawful in the Government's seizure of property in this situation. *Abel* v. *United States*, 362 U.S. 217, 240-41 (1960). One cannot throw something away and then claim that constitutional rights have been violated by the police in picking it up. *Hester* v. *United States*, 265 U.S. 57, 58 (1924).[11]

DENIAL OF PRETRIAL MOTION FOR DISCOVERY

Petitioner claims he was denied the due process of law by the court's refusal to grant his pretrial motion for examination of the bullets found in the deceased's body. There is no violation of petitioner's rights on this ground. The bullets and ballistics report were in court under the defendant's subpoena and, as the trial court observed, "were his to utilize as he saw fit" (P. 3904). No request

10. The question of abandonment is one of federal constitutional law, not of state property law. As the Supreme Court said in Jones v. United States, 362 U.S. 257, 266 (1960):

> . . . it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.

11. Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) and United States v. Merritt, 293 F.2d 742 (3d Cir. 1961) are inapposite. In *Work*, the court, over a vigorous dissent, found that the movant had not abandoned property for constitutional purposes by tossing it into a trash can beneath *his porch*. In *Merritt*, the court did not find a voluntary abandonment when the illegal search precipitated the throwing of the evidence out of the window. Petitioner, in this case, had voluntarily severed his connection with the furniture and it was placed on premises in which he had no interest. Thus, although the evidence was to be used against him, he was not in the class the constitutional prohibition against illegal searches and seizures was meant to protect. See, United States ex rel. Coffey v. Fay, 344 F.2d 625, 628 (2d Cir. 1965), Diaz-Rosendo v. United States, 357 F.2d 124, 132 (9th Cir. 1966), cert. denied, 385 U.S. 856 (1966).

was made for a recess to examine the bullets or look at the ballistics report. There is no prejudice to the defendant shown by these facts. Petitioner further contends that he was prejudiced by the "erroneous and misleading" testimony of the police ballistics expert. Petitioner cannot now claim a violation of his rights after his pretrial request was substantially fulfilled at trial and after he had a full opportunity at trial to avoid any prejudice. Petitioner has pointed to nothing that would establish prejudice resulting from the fact that his request was substantially fulfilled at trial rather than before.

USE OF SPECIAL JURORS

Petitioner's final contention is that the use of a special (Blue Ribbon) jury under form Section 749aa of the Judiciary law of New York violated his Sixth Amendment right to an imparital jury and the equal protection and due process clause of the Fourteenth Amendment. The constitutionality of the use of special jurors under this statute has been specifically upheld by the Supreme Court in two cases, *Fay* v. *New York,* 332 U.S. 261 (1947) and *Moore* v. *New York,* 333 U.S. 565 (1948). Petitioner's contention is without merit. *Vanderwyde* v. *Denno,* 113 F. Supp. 920 (S.D.N.Y. 1953).

Petitioner's application for a writ of habeas corpus is denied.

Motion denied. It is so ordered.

Dated: New York, N. Y.
October 13, 1967

Edmund L. Palmieri
EDMUND L. PALMIERI
U. S. D. J.

APPENDIX IV

Opinion and Order of United States District Judge Edmund L. Palmieri, December 1, 1967, Granting Petitioner's Motion for a Certificate of Probable Cause

UNITER STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 2514

UNITED STATES OF AMERICA, *ex rel.* MARK FEIN,
Relator,

against

JOHN T. DEEGAN, Warden of Sing Sing Prison, State of New York,
Respondent.

PALMIERI, J.

The relator's motion for a certificate of probable cause pursuant to 28 U.S.C. §2253 is granted. It is so ordered.

This conclusion has not been reached without difficulty in view of this Court's opinion of October 13, 1967, adverse to the relator's contentions. However, in the light of the dissenting opinion of Chief Judge Fuld of the Court of Appeals of the State of New York (18 N.Y. 2d 162, 272 N.Y.S. 2d 753 [1966]) I believe that I should not permit my views to present an obstacle to appellate scrutiny.

Appendix IV

Relator's counsel has urged two points for the first time on this application: the allegedly prejudicial opening remarks of the trial court addressed to the jury at the very outset of the trial, and the suggested invalidity of the two Supreme Court decisions (*Fay* v. *New York*, 332 U.S. 261 (1947) and *Moore* v. *New York*, 333 U. S. 565 (1948)) cited by this Court in support of its view that there was no invasion of the relator's constitutional rights by the use of a special (Blue Ribbon) jury under New York State laws. Although these contentions are not appropriately raised at this time, they have nevertheless been considered.

It is my view that the allegedly prejudicial remarks cannot be construed in the light attributed to them by the relator. They were part of a much longer statement, the essential meaning of which was an expression of caution with respect to the defendant's rights in a criminal trial.

Insofar as the alleged invalidity of the Supreme Court decisions is concerned, the argument is based upon the suggestion that by its decision in *Parker* v. *Gladden*, 385 U.S. 363 (1966) (a case which involved a gross interference with a deliberating jury in a criminal trial), the Supreme Court has indicated its readiness to disavow its previously expressed views upholding the constitutionality of the New York blue ribbon jury statute. I do not concur in this view. I adhere to the conclusion expressed in the opinion which is based upon the Supreme Court decisions to which I have already referred.

Dated: New York, N. Y.,
December 1, 1967.

/s/ Edmund L. Palmieri
EDMUND L. PALMIERI
U.S.D.J.

APPENDIX V

Opinion of Judge Kenneth B. Keating for the New York Court of Appeals, July 7, 1966, *People* v. *Fein*, 18 N.Y. 2d 162, 272 N.Y.S. 2d 753, 219 N.E. 2d 274

STATE OF NEW YORK
COURT OF APPEALS

1. No. 511. 65

THE PEOPLE &c., *Respondent*

vs.

MARK FEIN, *Appellant.*

KEATING, J.:

On November 8, 1963, a Harlem River drawbridge operator spotted a body later identified as Rubin Markowitz, a bookmaker, floating in the river. The last known contact with the deceased was a telephone call from him at 4:00 p.m. on October 10, 1963. Death was caused by four .22 caliber bullet wounds.[1]

The defendant is a business man with a wife and three children living in comfortable circumstances but also addicted to gambling and association with prostitutes. He maintained an apartment on 63rd Street under the fictitious name of "Weissman" for his extra-marital activities and contributed large amounts to the support of a prostitute known by numerous aliases but hereinafter referred to as

1. For a fuller statement of the facts, see the opinion below (24 A D 2d 32).

Gloria Kendal. Gloria, who procured entertainment for defendant's friends as well as engaging in prostitution herself, was the primary witness for the prosecution.

In essence, her testimony—and the People's case—was that sometime after 5:00 P.M. on October 10, 1963, defendant telephoned her (Gloria lived on 73rd Street) from the Weissman apartment and urgently requested her presence. She complied and upon her arrival he exhibited a trunk, admitting that he had shot his bookmaker, to whom he owed money from the recent World Series, and stuffed the body into the trunk. After defendant pleaded for her assistance, Gloria called a friend, David Broudy, who immediately left his Bronx apartment. In the meantime she asked defendant if he were sure Ruby was dead. Defendant allegedly responded in the affirmative and lifted the trunk lid exposing part of an arm, some new clothesline and some white material that looked like a shirt.

In addition to Broudy, a Miss Geri Boxer, who was to have picked Gloria up at the latter's apartment but was told by one Sandra Ede that Gloria was at the Weissman apartment, appeared at the apartment. These two, along with Gloria, loaded the trunk into a station wagon rented by defendant and drove to Gloria's apartment. Gloria went inside for a while and then returned to the others outside. The three then drove around, finally stopping on Harlem River Drive and throwing the trunk into the river. Gloria also threw in two duffle bags, one of which contained pieces of carpet from the apartment.

Defendant was convicted upon a jury verdict of Murder in the Second Degree and sentenced to State prison for

thirty years to life. After a full post-trial hearing, defendant's motion for a new trial was denied. The Appellate Division affirmed the judgment.

Defendant's contention that the use of a special jury deprived him of his constitutional right to a fair trial has been considered before and found to be without merit. (*Fay* v. *New York*, 332 U.S. 261; *Moore* v. *New York*, 333 U.S. 565).

Similarly, the record fails to support defendant's claim that unfavorable publicity aroused such prejudice in the community that he was deprived of a fair trial. The publicity in question for the most part took place at the time of arrest, nearly eight months prior to trial. Defendant's own counsel argued on a habeas corpus hearing four months prior to trial that the effect of publicity had long since passed and defendant was ready to go to trial. Finally, defendant never even sought a change of venue. (See *Stroble* v. *California*, 343 U.S. 181.)

Defendant next urges that the seizure by police of a chair from a warehouse and its introduction into evidence violated his constitutional rights. The chair in question had been in the Weissman apartment at the time of the murder. The serologist who examined and tested the chair reported that signs of human blood were present on the chair. However, there were insufficient stains present to group or type the blood.

We find that even if this objection was properly preserved, it has no merit. The facts show that defendant voluntarily relinquished all right, title and interest to the chair with an intention of terminating forever his ownership in it. Defendant abandoned his interest and retained

no rights in the chair which could be breached by its subsequent seizure by law enforcement officers.

Defendant also argues that the Appellate Division abused its discretion in failing to consider his appeal from the denial of his motion for a new trial on the ground of newly discovered evidence. It is clear, however, from the opinion of the Appellate Division (24 A D 2d 32) that the alleged newly-discovered evidence was fully considered by the court and found insufficient to warrant a new trial.

Moreover, it is well settled that this court has no power in a non capital case to review the discretionary order denying a motion for a new trial. The right to a review of such an order ceases at the Appellate Division. (*People* v. *Bonifacio*, 190 N.Y. 150; *People* v. *Luciano*, 275 N.Y. 547; *People* v. *Girardi*, 303 N.Y. 887; *People* v. *Mistretta*, 7 N.Y. 2d 843, 844.)

Although the evidence brought out at the post trial hearing on the motion for a new trial would, therefore, not normally be before us, since the hearing was so complete and extensive evidence was taken, much of which could be considered on a *coram nobis*, we have considered the merits of defendant's evidence.

The only serious question which arises from this evidence concerns defendant's contention that facts brought to light at the post trial hearing establish a failure of the prosecution to disclose material exculpatory evidence, thus denying defendant a fair trial. Specifically, defendant points to four instances of alleged suppression: the ballistics report of Detective Kelly, the testimony of Sandra Ede, the testimony of Mrs. McNair and Mrs. Bennett, and the testimony of Mrs. Generazio.

Appendix V

The objection in the first instance has little substance. The Kelly report of an inconclusive naked eye examination was in no way contradictory to, but was fully superseded by, the microscopic examination and analytic tests by Detective O'Brien who testified and was subject to cross-examination. Both the O'Brien report and the Kelly report were in the physical possession of the court during the entire trial pursuant to a subpoena by defendant and were fully available to defendant. In short, there was neither suppression of evidence nor was the evidence in question exculpatory. (See *Jordon* v. *Bondy,* 114 F.2d 599, 602.)

Similarly, the testimony of Sandra Ede, a prostitute who spent a good deal of time in Gloria's apartment and frequently took messages, was in no way suppressed. Sandra, who was under psychiatric care when she testified at the post trial hearing, consistently advised all representatives of the prosecution that she could not recollect the events of October 10, 1963.

Faced with an unstable and uncertain witness, whose testimony would add nothing to his case, the prosecutor cannot be faulted for choosing not to call her to the stand. However, he did the next best thing in providing the defense with the information. At the close of his case, the District Attorney in open court recalled who Sandra was and stated that since she claimed to have no recollection, he was not calling her to the stand. He then gave her name and address to defense counsel so they could do whatever they wanted with it. Defense counsel, who already knew about Sandra, chose not to call her either. Clearly, evidence is not suppressed when the defendant has such a knowledge of it.

Appendix V

Mrs. McNair and her daughter Mrs. Bennett lived two floors below the Weissman apartment. Defendant claims that their testimony that they heard shots from the rear of the building (the Weissman apartment was towards the front) on the day of the murder was suppressed by the People. Again, the questions are presented as to whether there was suppression and whether the evidence was exculpatory.

Mrs. Bennett told the investigators that she dated Mr. Kassow (one of the original lawyers for defendant) and had told him of hearing the shots and of seeing a trunk in the apartment lobby prior to the murder. Mr. Kassow himself testified that Mrs. Bennett had told him of seeing the trunk but when he asked her if she had heard any shots, she replied in the negative.

The testimony is conclusive that, regardless of what Mrs. Bennett *actually* told Mr. Kassow, the district attorney had no reason to believe that he knew anything that defendant did not know. Moreover, the trial court found, and we concur, that these women possessed no exculpatory evidence. The prosecutor and Detective Leman testified that the women told them by word and hand gestures that the shots had come from up and towards the front of the building, which corresponded to the Weissman apartment. The women had little knowledge of guns or gun shots yet they claimed to have heard from the alley three floors below—through an open window—four very loud sounds which scared them and which they were certain came from a gun; this despite the fact that .22 caliber shots make a comparatively small report. The words of the Trial Judge,

who had an opportunity to observe these witnesses, best sum up their testimony:

> "Taking their credible testimony in the most favorable light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window . . . late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the 'shots' because of the trial assistant's request that she not discuss it with anyone is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk."

The Judge further noted that they misdated their interview by several months, failed to remember their description of the trunk from one week to the next, and that the only probable explanation for inconsistencies in various testimony was that they told the prosecutor an entirely different story from that which they recollected at the hearing. The prosecutor, having been told by the witnesses that defendant's attorney was informed and the information being *at best* very tenuous, could not be expected to come forward with the pointless task of repeating that information.

The defendant's claims with regard to Detective Kelly, Sandra Ede and the Bennett-McNair testimony are perfect

examples of why the public prosecutor—an experienced trial lawyer—must have *some* area in which he is permitted to judge, in the context of the entire case, the value of evidence to the defense in terms of its potential impact on the jury; he must have *some* discretion in determining which evidence must be turned over to the defense. These claims are examples of why no court has ruled that *every* statement obtained by the district attorney or the results of *every* avenue of investigation pursued by him must be disclosed to the defense regardless of its materiality, credibility or potential impact on the trier of fact. As Judge Hastie has stated in a frequently cited passage (*United States ex rel. Thompson* v. *Dye,* 221 F.2d 763, 769 [3rd Cir. 1955], cert. den. 350 U.S. 875), there are many situations in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor should know that even testimony which he honestly disbelieves is of a type which in all probability would make it every persuasive to a fair-minded jury. It is not every case in which the prosecution must reveal the availability of testimony inconsistent with government contentions, but in special circumstances non-disclosure may amount to fundamental unfairness in a criminal trial.

With regard to Mrs. Dagmar Finch Generazio, defendant claims not only the suppression of her testimony but also the countenancing by the prosecution of false testimony by two of its witnesses regarding a confrontation between Gloria and Dagmar preceding a recantation by Gloria. He argues that this additional fact of false and

perjurious testimony automatically requires a new trial under our decision in *People* v. *Savvides* (1 NY 2d 554).

Dagmar Finch Generazio was a prostitute friend of Gloria Kendal whom Gloria allegedly called on the day of the murder seeking a car to move the box. During the investigation Dagmar told the prosecution varying stories as to the time she received the call but mainly told them that it was after 6:00 P.M. She had claimed to be in Gloria's apartment that afternoon to meet a man but when he did not appear, she left around 4:00 P.M. According to her story she went to Gail Weiner's apartment (where she allegedly received the call) arriving there between 6:00 and 7:00. At the post trial hearing, however, she testified that she was in Gail's apartment and was certain she received Gloria's call there between 3:00 P.M. and 4:00 P.M.

At the close of Gloria's direct testimony, the prosecutor called defense counsel to the bench and there made a statement for the record. In this statement he explained that twice in the course of his investigation Gloria had recanted her testimony about hearing defendant admit the shooting and seeing the body in the trunk. The first recantation does not concern us as there is no question raised concerning it. With regard to the second, the prosecutor said that on September 28, 1964, in his office, Gloria had recanted and on September 30 she said she had lied two days previously. This information was provided so that defense could cross-examine Gloria about it.

It appears that prior to the second recantation Dagmar had been brought to the District Attorney's office and there

confronted Gloria with the story that Gloria had called Dagmar at Gail's apartment some time between 6:00 and 7:00 or possibly later. Gloria denied the call, called Dagmar a liar and then started yelling and screaming that Detective Leman was getting people to lie about her. The detective took Dagmar from the room and Gloria demanded to call her lawyer. Thereafter Gloria recanted for the second time and it is with regard to these circumstances that the defendant charges the prosecution with countenancing false testimony.

In the first place, the record amply sustains the finding of the court below that the testimony in question was not in fact false or perjurious (see 24 A D 2d 42). While it may be that Gloria and Detective Leman failed to disclose the presence of Dagmar prior to Gloria's recantation, nowhere in their testimony can we find statements actually false or perjurious.

Moreover, the mere labelling of testimony as "false" does *not* change the nature of the inquiry and require an automatic reversal. Whether the charge be false testimony or suppression of exculpatory evidence, the principles are the same. The defendant is entitled to a fair trial without trickery or overreaching by the prosecution, and the question is whether the prosecutor's conduct negated that right. The principle is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused (*Brady* v. *Maryland*, 373 U.S. 83, 87).

While the principles governing false testimony and suppression are similar, it may be that the tests will differ slightly because intentional false testimony will sometimes

be conclusive evidence that defendant was denied a fair trial. For example, in a case like *Savvides* where the prosecutor knows of a blatant lie by a witness on a material issue, it is clear that defendant's trial has not had that element of fairness which our justice demands. The resulting prejudice to *Savvides* could not be characterized or discounted as harmless (*Savvides, supra,* p. 557). Likewise, there will be cases of suppression equally offensive to our sense of justice for the same reason. As Judge Friendly has concluded,

> "the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play." (*Kyle* v. *U.S.,* 297 F.2d 507, 514.)

Our approach is in accord with that of the United States Supreme Court. In *Napue* v. *Illinois* (360 U.S. 264), where the district attorney failed to correct his witness' false testimony that he had received no promise of consideration, the court made its own examination of the facts and the importance of the testimony. The court's own statement of its holding indicates there is no rule of automatic reversal:

> "As previously indicated, our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." (360 U.S., p. 272.)

Similarly, our examination is directed at the prejudice caused to defendant and the effect on the outcome of the

trial by the possible concealment of, or misleading testimony regarding, Dagmar Generazio.

It should be noted, on behalf of the district attorney, that Dagmar's story of receiving a phone call from Gloria at Gail Weiner's apartment was steadfastly denied throughout the pre-trial investigation by both Gloria and Gail, and, even if true, fitted with the prosecution's theory that Gloria may have called Dagmar while she was in her apartment and Broudy and Boxer were outside in the station wagon with the trunk. Moreover, defendant knew about Dagmar and her story of a phone call and even cross-examined Geri Boxer with regard to her knowledge of Dagmar. In fact, defendant's investigator mentioned to Detective Leman in a hallway conversation that defendant knew of the phone call, and he even asked whether the prosecutor was going to put Dagmar on the stand.[2] Thus, the prosecutor had good reason for failing either to see anything of an exculpatory nature in Dagmar's testimony or to perceive the defense's inability to locate her.

As a matter of fact, under the difficult circumstances of this entire case, the district attorney and his staff—in turning over Sandra Ede's name, offering the evidence of Gloria's recantations, and correcting various testimony by Gloria just to mention a few instances—have combined a strong sense of fairness with a high degree of expertise.

Concealment or non disclosure, however, is not ruled out by the good faith of the prosecutor, and, without in

2. The testimony indicates that when Leman asked if the investigator had called Dagmar's mother in Baltimore, the latter requested the mother's number but was refused. There was *no* request for the name, address or phone number of Dagmar nor any indication that the defense could not locate her.

any way condoning the failure of the prosecutor to disclose affirmatively Dagmar's presence prior to the recantation and her story of the phone call, our decision must rest on an examination of the evidence involved, its materiality and prejudicial effect, and most important, its possible effect on the jury. (*People* v. *Kingston*, 8 N.Y. 2d 384, 387; *People* v. *Rosario*, 9 N.Y. 2d 286, 291; Code Crim. Pro., §542.)

Even *if* the jury had chosen to believe that Gloria's recantation resulted from what Dagmar said rather than her anger at Detective Leman, the effect of Dagmar's testimony would only have been to challenge Gloria's credibility. This the defense attacked so relentlessly at trial that we cannot possibly see how the further challenge as to whether she made a phone call could possibly have affected the jury verdict.

The defense questioned her along her entire road of deviation from the moral norm, while the prosecution made no effort to counter or mitigate this. The prosecutor himself, in summation, referred to Gloria as "infamous", "notorious", "the morals of an alley cat", "a moral leper", and "an old whore". Yet the jury apparently considered the various corroborating witnesses such as Geri Boxer and David Broudy and the circumstances of defendant's rental of the station wagon and his meeting with the deceased, and believed just enough of Gloria's testimony to convict defendant. We fail to see how Dagmar's evidence could have changed this.

The Trial Judge, who had an opportunity to hear and study Dagmar and her testimony, made certain findings

regarding her evidence and we cannot improve on his expression of those findings:

> "Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gale Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on behalf of the defendant, upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon, I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus [Gloria] on the day, or month, of the killing does not warrant belief."

Though there are cases holding it to be of no consequence that evidence in question bore upon the prosecution witness' credibility rather than directly upon defendant's guilt, here the chain from the evidence to the prosecution witness is quite indirect and must first bridge the gap of Dagmar's incredibility. Even then it is either cumulative or peripheral. In no case cited by defendant, where the failure to call attention to evidence has required a new trial, has the evidence been so remote from the issue of guilt or so speculative.

The evidence here was not evidence which would have had an effect on the jury's determination The prosecutor's

act did not deprive defendant of a fair trial and the People's conduct of the case was not so contrary to fundamental concepts of justice and did not constitute a denial of due process.

Defendant's remaining arguments were adequately dealt with in the courts below and we find no merit to them. Defendant has had one fair trial and we have found no defect or error requiring a reversal or a grant of a second trial.

The judgment of the Appellate Division should be affirmed.

APPENDIX VI

Dissenting Opinion of Judge Fuld

FULD, *J.* (dissenting).

I am reluctant to vote for affirmance in this case in view of the conceded nondisclosure and concealment by the prosecution of evidence which, in my judgment, might well have persuaded the juroros to reach a different verdict. Although the defendant points to several such items, I direct myself to but one of them. The record reveals that a Mrs. Dagmar Generazio had given the prosecution information which was at odds with the trial testimony of the People's key witness, Gloria Kendal, and that such information had not been disclosed to the jury or to the defense. Such information suggested—or, at least, so the jury could have found—that Gloria, rather than the defendant, was responsible for the murder and thus had a compelling motive to accuse him of the crime. Since the case against the defendant admittedly depended on the testimony of Gloria, there is heightened significance in the fact, likewise not revealed, that Gloria had actually been confronted with this information, as well as by Mrs. Generazio herself, in the district attorney's office immediately before she recanted (for the second time) her story against the defendant.

The concept of fairness, of due process, imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused, particularly when such evidence contradicts the testimony given by the People's witnesses in open court. (See *Brady* v. *Maryland,* 373 U.S. 83, 87; *Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; *Mooney* v. *Holohan,* 294 U.S. 103; *Levin* v. *Katzenbach,*

363 F.2d 287; *Barbee* v. *Warden,* 331 F.2d 842; *People* v. *Robertson,* 12 NY 2d 355; *People* v. *Zimmerman,* 10 NY 2d 430; *People* v. *Savvides,* 1 NY 2d 554). This duty persists even though the defense might, by dint of a little more effort, have independently uncovered the evidence in question and even though the district attorney regards it as lacking in probative force or worthless. The prosecution is not privileged "to decide for the court what is admissible or for the defense what is useful". (*Griffin* v. *United States,* 183 F.2d 990, 993.)

The argument that disclosure would not have changed the verdict "overlooks the variant functions to be performed by jury and reviewing tribunal." (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) It is for jurors, not judges of an appellate court such as ours, to decide the issue of credibility, and we should be particularly observant of this principle in the case before us, where disclosure might well have impeached the one witness without whom there would admittedly have been no prosecution. In this view, it "matters little" that the district attorney's silence was not the result of guile or a desire to prejudice. (*People* v. *Savvides,* 1 N.Y. 2d 554, 557, *supra.*) "The principle of *Mooney* v. *Holohan* [294 U.S. 103, *supra*]," as the Supreme Court has pointedly observed (*Brady* v. *Maryland,* 373 U.S. 83, 87, *supra*), "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

I would reverse and order a new trial.

Chief Judge DESMOND and Judges VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur with Judge KEATING; Judge FULD dissents in a separate opinion.

Judgment affirmed.

* * *

APPENDIX VII

Remittitur of New York Court of Appeals, July 7, 1966, as Amended Pursuant to Order Dated September 22, 1966, 18 N.Y. 2d 722, 274 N.Y.S. 2d 159

1. No. 511. 65

THE PEOPLE &c., *Respondent,*

vs.

MARK FEIN, *Appellant.*

BE IT REMEMBERED, That on the 17th day of November in the year of our Lord one thousand nine hundred and sixty-five, Mark Fein, the appellant in this cause, came here unto the Court of Appeals, by Phillips, Nizer, Benjamin, Krim & Ballon, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis Nizer, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, and thereafter a motion to

amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, in addition to the other constitutional questions expressly passed upon in the opinion, viz.: Appellant contended that the order of the Supreme Court denying his pretrial motion for discovery and inspection of the bullets found in decedent's body deprived him of a fair trial. The Court of Appeals held that the appellant's constitutional rights were not violated.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, by the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Appendix VII

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

APPENDIX VIII

Remittitur of New York Court of Appeals, July 7, 1966, as Amended Pursuant to Order Dated February 21, 1967, 19 N.Y. 2d 691, 278 N.Y.S. 2d 880

THE PEOPLE &c.,

Respondent,

vs.

MARK FEIN,

Appellant.

BE IT REMEMBERED, That on the 17th day of November in the year of our Lord one thousand nine hundred and sixty-five, Mark Fein, the appellant in this cause, came here unto the Court of Appeals, by Phillips, Nizer, Benjamin, Krim & Ballon, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Departmen. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis Nizer, of counsel for the

appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, and thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, in addition to the other constitutional questions expressly passed upon in the opinion, viz.: Appellant contended that the order of the Supreme Court denying his pretrial motion for discovery and inspection of the bullets found in decedent's body deprived him of a fair trial. The Court of Appeals held that the appellant's constitutional rights were not violated.

And thereafter a motion to further amend the remittitur having been granted this remittitur is hereby further amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Appellant contended that the order of the trial court, subjecting him to a trial before a special jury rather that a general jury, denied him a fair trial and deprived him of due process and the equal protection of the laws. The Court of Appeals held that the appellant's constitutional rights were not violated and that former Section 749-aa of the Judiciary Law authorizing such a trial is constitutional.

Appendix VIII

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, by the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

Appendix VIII

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*
RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

Original Remittitur Filed Jul 18 1966
Supreme Court
New York County
Appeal Bureau

Amended Remittitur Refiled Mar 1 1967
Supreme Court
New York County
Appeal Bureau

APPENDIX IX

Denial of Review, *Fein* v. *New York*, 385 U.S. 649 (1967)

FEIN *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 793. Decided January 23, 1967.

18 N. Y. 2d 162, 219 N. E. 2d 274, appeal dismissed and certiorari denied.

Louis Nizer, Paul Martinson and *Bennett Boskey* for appellant.

Frank S. Hogan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

Denial of Rehearing, *Fein* v. *New York*, 386 U.S. 978 (1967)

March 20, 1967. Petition for rehearing denied.

APPENDIX X

Opinion of the Appellate Division, First Department, October 19, 1965, 24 A.D. 2d 32, 263 N.Y.S. 2d 629

SUPREME COURT

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

BREITEL, P.J., RABIN, EAGER, STEUER, WITWER, JJ.

THE PEOPLE of the State of New York, *Respondent*

vs. 9251

MARK FEIN, *Defendant-Appellant.*

Appeal from a judgment of the Supreme Court (Gerald P. Culkin, J.), rendered May 26, 1965, in New York County upon a verdict convicting defendant of the crime of Murder in the Second Degree.

Louis Nizer of counsel (*Robert Arum, Paul Martinson, Harold Klapper* and *George Berger* with him on the brief; Phillips, Nizer, Benjamin, Krim & Ballon, attorneys), for appellant.

Eric A. Seiff of counsel (*H. Richard Uviller* with him on the brief; *Frank S. Hogan, District Attorney*), for respondent.

STEUER, *J.*

In the early morning of November 8, 1963, Fred Petraca, a stationary engineer who operated the Spuyten Duyvil

Appendix X

Drawbridge of the New York Central Railroad noticed a body floating in the Harlem River. The body was later identified as the remains of Rubin Markowitz, a part-time grocery clerk whose main occupation had been the booking of bets on sporting events. Investigation revealed that the deceased was last seen by his family on the morning of October 10, 1963, and the last known contact with him was a telephone call to one of his customers at 4 o'clock that afternoon.

Further investigation developed that the deceased did a large part of his book-making business by telephone. For this purpose he employed an answering service. The procedure was for the customer to call the service and leave a telephone number at which he could be contacted. Markowitz called the service at half-hour intervals, received the numbers and made the calls. In these arrangements the customers were given fictitious names. One of these names was "Shore" and the telephone number was that of an apartment at 125 East 73rd Street. The tenant of this apartment was a Mrs. Carmela Lazarus. She was a woman with an extraordinary number of aliases, who at the time was known as Gloria Kendal. It was through her that the prosecution learned of the defendant. And it was through her and by virtue of the information given by her that the defendant was charged with homicide and convicted by a verdict of the jury of Murder in the Second Degree.[1]

1. Following conviction a motion was made for a new trial on newly discovered evidence. The motion was denied. The notice of appeal embraces that determination, but no error in that decision was urged on appeal. Nevertheless, we have given attention to the testimony elicited, where appropriate to the points raised.

Appendix X

The defendant challenges the validity of the verdict and judgment of conviction, advancing some 17 specifications of error. We have examined all of these but find that only six merit discussion. These six can be conveniently treated under three headings—whether the evidence was sufficient to convict beyond a reasonable doubt; whether the District Attorney suppressed exculpatory evidence; and whether the prosecution countenanced false testimony, knowing it to be false, and failed to correct it.

In bare outline, the case of the People was that the defendant, on October 10, at about 5 o'clock in the evening telephoned Gloria Kendal and urgently requested her to come at once to an apartment located at 406 East 63rd Street. Upon her compliance he told her he had killed Markowitz and exhibited his body, which was resting in a trunk. At defendant's suggestion she procured the services of two friends, and the three of them took the trunk in a station wagon to the end of Dyckman Street at the Harlem River and dropped the trunk into the river.

There is no contradiction of the testimony giving this sequence of events, but defendant challenges it on the grounds of inherent improbability, variance with physical and known facts, and the unreliable character of the testimony used to establish it.

The first argument rests on the character of the defendant. It appears that he is a business man, married and the father of three children. He and his family lived in very comfortable circumstances, and he was possessed of substantial resources. He had no prior criminal record and no history of violence was established. It is claimed that it

is highly improbable that one so circumstanced would engage in a homicide where the only suggested motive was to escape payment of a debt of some $7,000.

The reverse of this picture must also be considered. Defendant had long been addicted to betting substantial sums with bookmakers. He also indulged in extensive association with prostitutes. It clearly appears that he not only contributed largely to the support of the Kendal woman, he also maintained the 63rd Street apartment for extra-marital activities. While these activities might have been well within the limits of defendant's financial competence, there was evidence that on occasion he did borrow to meet his expenses for this double life. Money difficulties were therefore not entirely to be ruled out. Nor did the prosecution's case rest on the motive of robbery. This was merely advanced as a possible explanation. The jury might well have found that the defendant, having chosen to inhabit the half-world that he did, would be subject to the stresses, and the methods of relieving them, that are more common to its denizens than to those whose activities conform more strictly to conventional standards.

The defendant advances several grounds for claiming that the physical facts belie the narration of events by the prosecution witnesses. We will consider these separately. The testimony was that, after the trunk containing Markowitz' body was loaded on the station wagon, the vehicle was driven to the 73rd Street apartment, where Miss Kendal got out and went to her apartment. The station wagon remained parked in the street. The two persons remaining with it estimate the time that they waited for her as be-

tween 30 and 45 minutes. She places it at far less—about 10 minutes. The seriousness of this incident lies in the claim that a bleeding body would be liable to attract attention and that Miss Kendal's assistants would never have taken such a risk. To counteract this, there is no proof that the body was bleeding at the time, and some hours after death it does not appear that it would be. Furthermore, the testimony was that defendant stated that he had placed canvas bags in the trunk to absorb any blood and prevent leakage. Lastly, it was for the jury to say whether people who would undertake an enterprise of this nature would be so worried about such a contingency that they would not possibly have waited for this period of time.

Next it is claimed that it was a physical impossibility for these three to have lifted the trunk out of the station wagon and to have dropped it over the wall which borders Dyckman Street. Markowitz in life weighed about 185 pounds. There is no proof of the weight of the trunk, but for the purposes of this argument we will assume that the claim that it weighed 50 pounds is sufficiently accurate, thus making the total weight about 235 pounds. The wall in question is about four feet high. The proof of the lifting and carrying is not particularly detailed. The three people involved were: Miss Kendal, five feet seven inches tall and weighing about 135 pounds. She describes herself as a particularly strong woman. Broudy, the only man taking part, was an inch taller, and weighed 165 pounds. He had been a taxi driver for most of his adult life. Miss Boxer's dimensions do not appear, and the record is not consistent as to how much assistance she lent the other two. In view

of the very short distance the trunk would have to be carried (about 7 or 8 feet) and the fact that in the lifting a portion of the weight could be made to be borne by the wall itself by canting the trunk, plus the fact that the jury had ample opportunity to judge the strength of these persons, we believe that it cannot be said that this testimony represented a physical impossibility.

The defendant also contends that if the trunk were dumped into the river at 179th Street on October 10, the body could not have been found on November 8 at Spuyten Duyvil, some three miles away. Admittedly, the record is barren of any scientific proof as to whether or not these facts are physically inconsistent. The point was never raised until after the trial.[2] From the testimony in the case, it did happen, and there is nothing to show in this highly controversial area that it could not have happened.

Finally on this phase of the argument the defendant points to the absence of any evidence of blood on the furniture or walls of the 63rd Street apartment. From the medical testimony it is fairly conclusive that the deceased must have shed a considerable quantity of blood. None of the three witnesses who were in the apartment on the evening of October 10 saw any blood on the furniture, and an examination of the furniture disclosed only one minute speck on a chair. This speck was so small that it could not be typed. As proof that the homicide took place in the apartment,

2. Testimony to this effect was offered on the motion for a new trial. We do not find it to be of such conclusive nature that the interests of justice would require a new trial; and on the question of whether the jury verdict was proper, it cannot, of course, be considered.

it can be disregarded. However, there was evidence that a section of the carpet had been cut away prior to the arrival of the witnesses at the apartment and the resulting strips of material were in a duffle-bag. This bag was taken in the station wagon along with the trunk, and similarly disposed of.

We conclude that these facts do not demonstrate that the homicide could not have occurred in the apartment, nor that the narration of facts by the People's witnesses is factually impossible. It is true they raise issues but in no sense do they preclude a finding that no reasonable doubt existed.

We come now to the question of the reliability of the testimony. It is not disputed that Mrs. Lazarus or, as she was generally referred to on the trial, Gloria Kendal, was a completely amoral person who could well merit the defense's description as a depraved character. It has, however, often been recognized that crimes in the category here under review are seldom committed in the presence of reliable and substantial witnesses. Either such crimes must go unpunished or the jury must be allowed to make a determination that on this occasion the testimony reflects what actually happened (see *People* v. *Peller*, 291 N.Y. 438, 446). Such a determination most frequently is largely influenced by the relationship of the testimony from the doubtful source to facts established from more certain origins. Applying that test it will be found that the record reveals as follows:

The defendant on October 10 owed the deceased $7,000. A friend of his, one William Tishman, owed the deceased

about $14,000. Defendant arranged with Tishman to pay off both debts on October 10, the money being supplied mostly from the proceeds of a loan on collateral supplied by the defendant. Tishman was to give the defendant his share but was unable to do so, and gave a note. Defendant, in a statement to the police, claimed that he had paid the entire debt to the deceased on the afternoon of October 10. Miss Kendal saw the Tishman note in defendant's possession when she was at the apartment in the early evening of October 10. So that some contact between the deceased and the defendant on the day in question was abundantly established.

Miss Kendal's testimony was that on her arrival at the 63rd Street apartment the immediate question considered was the disposal of the trunk containing the body. For this purpose she enlisted the aid of David Broudy, a friend of hers, who came to the apartment in response to her call. Broudy came in his brother's automobile but, when he saw the trunk, he told the defendant that he could not get it into his car. The defendant thereupon arranged for the rental of the station wagon. The latter fact is established by the records of the rental company and the unimpeached testimony of its officer and of the employee who turned over the station wagon to the defendant. Miss Kendal testified that she went with the defendant to the rental agency and the rental agent of the 63rd Street apartment building testified that he saw them leave the apartment together at the time she indicated. Furthermore, it appears without doubt that the defendant tried to conceal the fact that he had rented the station wagon by disputing the car rental charge and laying a trap to confuse the employee who turned over

the station wagon to him. So the defendant's connection with the disposal of the body as testified to by Miss Kendal was amply established.

It also appeared that defendant misinformed the police in the early stages of the inquiry as to his connection with the apartment on 63rd Street and his relationship with both the deceased and Miss Kendal. The apartment was rented in the name of William Weissman, though the defendant paid the rent in cash, bought the furniture, and later terminated the lease, paying the rental until the apartment was re-rented. The only record connection was that his name appeared as a reference for the fictitious Weissman in the application for a telephone. When questioned by the police as to this, he stated that the apartment was rented by a prostitute named Margaret Foster, and that he gave the reference as a favor to his friend Tishman, who was the protector of Margaret Foster, and also the "Shore" who appeared in the deceased's books. Actually, Margaret Foster was one of the many aliases of Carmela Lazarus or Gloria Kendal.

Many other items of testimony confirm parts of the testimony given by Miss Kendal, in addition to that given by Broudy and the third member of the disposal group. It leads to the conclusion that on this very material part, the prosecution's contentions were established beyond a reasonable doubt. The only fact which rests on her unsupported testimony is that the defendant did the actual shooting.[3] Considering all the facts which corroborate her testimony

3. The defense contends that the fact that Markowitz's body was in the trunk also rests on her unsupported testimony. While no one else testifies to seeing the body, Broudy testified to an admission by the defendant to that effect.

in the related aspects of the case, we would not say that the prosecution rests on testimony so questionable that it cannot remove any reasonable doubt. Beyond that we have no function. It is for jurors not Judges of an appellate court to decide the issue of guilt (*People* v. *Mleczko*, 298 N.Y. 153, 163).

Passing now to the claims of concealment of exculpatory testimony by the District Attorney, we find that four such instances are claimed.

The first of these concerns Sandra Ede. Miss Ede was a prostitute who spent a good deal of time in the Kendal apartment on 73rd Street. Miss Kendal testified that she was in the apartment on October 10 when the defendant called. Miss Kendal had an appointment with a Miss Geraldine Boxer who was to call for her in Miss Boxer's car. Kendal testified that she told Ede she was going to 63rd Street and to tell Miss Boxer when she arrived that she had gone there and that Miss Boxer should meet her there. Miss Boxer testified that when she arrived at the Kendal apartment house she called on the intercom and the Ede woman gave her the message.

On the motion for a new trial it was established that the District Attorney interviewed Miss Ede and she refused to testify. She stated that if called she would testify that she was not in the apartment at the time and consequently never received the message; that she had never spoken to Miss Boxer on the intercom; and that on the afternoon in question she was in her own apartment to see to the installation of a telephone. Concededly the District Attorney gave the defense the name and address of Miss Ede but the claim is that the full extent of her interview was not revealed.

However, it appears that whether or not it was revealed by the District Attorney or obtained through interviewing Miss Ede, the defense was well aware of Miss Ede's contentions. It appears that Geraldine Boxer, whose testimony Miss Ede contradicted, was brought to the office to confront Miss Ede. On the cross-examination of Boxer, the following occurred:

> "Q. Did Sandra deny that? A. She said she doesn't remember.
>
> "Q. Did Sandra say that she didn't talk to you on the telephone that day? A. I don't know. As far as I know, when I was there she said she didn't remember; she couldn't remember that date in particular.
>
> "Q. Wasn't some way of fixing the date discussed in the District Attorney's office? A. I don't know what you mean by fixing the date.
>
> "Q. Well wasn't there something said about the installation of a telephone? A. Yes.
>
> "Q. And didn't Sandra fix the date by the installation of a telephone, and did she not say that she did not speak to you that afternoon, because her telephone was being installed in some other place? Did she say that? A. I believe she said her telephone was being installed, but I also believe that the time element was not asserted."

It therefore appears that all the Ede statements were known to the defense. Despite this knowledge the defense did not call her as a witness. The contention of concealment was not proved.[4]

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4. It is also significant that despite the elaborate preparation and presentation on the motion for a new trial, the obvious method of verifying the Ede version, by the telephone company records, was not resorted to.

Appendix X

The second alleged failure to disclose concerns the information of Mrs. Bennett and her mother, Mrs. McNair. These ladies were tenants of an apartment in 406 East 63rd Street. They occupied an apartment in the rear of the building, whereas the "Weissman" apartment was in the front. They were interviewed by the police and told them that on the afternoon of October 10 they heard pistol shots which they believed emanated from the alleyway beneath their windows and in the rear of the house. Concededly the defense also interviewed these ladies before the trial but it is claimed they never revealed this information. As there were several interviews it is difficult to see what else could have been discussed, as these women did not profess to have any other relevant information.

The third alleged failure is in regard to Mrs. Generazio, an associate of Miss Kendal in the practice of prostitution. She also used many names. In an interview with the District Attorney she told the prosecution that at 3 o'clock in the afternoon of October 10th the Kendal woman had telephoned her asking her to procure an automobile to transport a large box. Her story varied from time to time from negation of the call to placing it at 9 o'clock that evening, but at the time of the hearing it had crystallized to the early afternoon, preceding a certain television program which she watched. The District Attorney never gave the results of these interviews to the defense, nor did he volunteer the name and address of the witness. That the defense was aware of her existence is undeniable—counsel asked about her on cross-examination, using one of her aliases. A Mr. Whelan, an ex-police officer who was hired as an investiga-

tor by the defense, asked one of the detectives for her address. The detective replied that he was not at liberty to disclose it. The defense did not pursue the matter further, and no request was made by counsel of anyone else to the District Attorney.

Lastly, it is claimed that the prosecution suppressed a ballistics report by the Police Department. Far from being suppressed, the report was subpoenaed and was in the courtroom at all times in common with all other reports made by police officers. When defense counsel wished to examine or use any of there reports, he asked for them and was immediately accommodated. He never asked for this report. The claim is that it should have been called to his attention.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process if the evidence is material to guilt or punishment, irrespective of the good faith of the prosecutor (*Brady* v. *Maryland,* 373 U.S. 83). Although the requirement of a request for the suppressed testimony has not to our knowledge been obviated by any subsequent expression of the Supreme Court, we prefer not to place our decision on the absence of any request in the claimed instances of suppression. We have noted that this requirement has been stated not to be a *sine qua non* (*United States* v. *Wilkins,* 326 F. 2d 135). On the other hand, we cannot believe that it is the law that every statement by a person interviewed by the District Attorney must be disclosed to the defense regardless of its materiality or probable veracity merely because the defense, after the event, claims that it might have made use of it. Mr. Justice White, concurring in *Brady* (*supra,* P. 92) stated

specifically: "I . . . would not cast in constitutional form a broad rule of criminal discovery." Nor do we believe that any such all-embracing rule has been enunciated. It must be apparent that in a many faceted investigation such as the instant prosecution, a great many persons will necessarily be interviewed. Avenues of investigation will prove to be dead-end streets. We have not yet reached the point where we substitute for the adversary system a process whereby the defense is to be kept advised of every step taken by the prosecution. Rather, we think the true test of what must be disclosed is that of simple fairness. The opposing considerations were well expressed by Judge Hastie:

> "It seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair minded jury." (*United States* v. *Dye*, 221 F. 2d 763, 769.)

While a matter of essential fairness cannot be fixed by express rule or be the subject of precise definition, a brief review of what has been considered unfair may make decision more uniform. In *Brady* (*supra*), the evidence suppressed was one of three confessions made by a co-defendant. In the two supplied he charged the defendant with firing the fatal shot, in the one withheld he admitted he fired it; in *United States ex rel. Almeida* v. *Baldi* (195 F. 2d 815), the caliber of the fatal bullet, differing from the caliber of the defendant's revolver, was concealed; in *U.S.* v. *Wilkins*

(*supra*) and in *Wilde* v. *Wyoming* (362 U.S. 607), the testimony of two reputable eyewitnesses to a robbery to the effect that the defendant was not one of those participating was withheld; in the *Dye* case (*supra*) where the intoxication of the defendant was offered to show absence of intent, the arresting officer who had stated he believed the defendant to have been intoxicated was not called; in *United States ex rel. Montgomery* v. *Ragen* (86 F. Supp. 382) in a prosecution for rape, the report of an examining physician that the complainant had not been violated was suppressed. Examples could be multiplied, but these are believed to be typical. In two of the cases the reputable character of the witnesses was an important factor in determining that the practice was unfair. In the others, it was the controlling nature of the evidence.

Applying these rules to the alleged instances in the case at bar, we find that in the Ede testimony and the ballistics report there was no ground for even a claim of suppression. As regards Bennett and McNair, even if suppression could be found—which we doubt—the evidence was of such a tenuous nature that even the fairest minded prosecutor would not feel called upon to advise the defense. As for the Generazio testimony, this was clearly not from a source that a jury would be expected to credit. And in view of defendant's knowledge of the witness and that she had some connection with the case, the prosecutor was entitled to assume that any further disclosure would be requested. In no case that has come to our attention has the failure to call attention to evidence whose bearing on the issue of guilt been so remote and speculative been considered suppression.

Appendix X

There is also a claim that the District Attorney sat by while testimony was given that he knew to be false. It appears that twice during the preparation of the case Miss Kendal told the District Attorney that she would not testify that the defendant admitted the killing or that she saw the body in the trunk, and that her previous statements to this effect were untrue. Upon completion of her direct testimony, the District Attorney disclosed these incidents to the defense. Both she and the detective present were cross-examined as to them. As to the first recantation, no question is raised. It appears that the second recantation immediately followed an interview in which the Kendal and Generazio women were brought together. In the interview Miss Kendal became incensed at Mrs. Generazio, berated her and finally refused to remain in the room with her. The latter was excused and left. Miss Kendal then turned her wrath upon the detective, accusing him of seeking witnesses to discredit her and using Gestapo methods. He was excused and then she made her recantation. The question was asked as to who was present at the interview. Miss Kendal said she did not remember. The detective named the assistant district attorney but did not name Mrs. Generazio. Technically speaking, this testimony was correct, because at the time of the recantation she was not present. But it was not an accurate statement as to those present at the interview.

The principles behind the rules governing the situation where the District Attorney sits by and allows false testimony to be given and that where the prosecutor suppresses exculpatory evidence are the same. The principle is still

that the defendant is entitled to a fair trial without trickery or overreaching by the prosecution, and the question is whether the District Attorney's conduct negated that right (*People* v. *Savvides,* 1 NY 2d 554). Without a showing that the questioned testimony was false to the knowledge of the prosecution, no unfairness is established (*People* v. *Fanning,* 300 N.Y. 593).

The cross-examinations in which the alleged false testimony was given were not directed to the point on which the testimony was inaccurate. As regards the Kendal woman, the efforts of counsel were to show that the words of the recantations amounted to unequivocal admissions that the earlier statements were in fact false. This was followed by an endeavor to obtain an admission that the recantation represented the fact. With the detective the effort was to show that the recantation was not, as Kendal claimed, the consequence of sympathy for the defendant and remorse for the destruction of his family life. In a way counsel proved his point—that the motive given was false—but he also established a reasonable motive, annoyance with the police investigators. The significant point is that who was present at the interview was not emphasized and actually received only cursory attention. The matter of the recantations was only a small part of extended cross-examinations. When it is considered that the District Attorney participated in a very large number of interviews, his failure to correct what appeared to be an incidental fact in regard to one of them is not shown to be deliberate nor an effort to overreach the defense. This view is strengthened by the fact that the whole subject of the recantations was revealed

to the defense by the same Assistant District Attorney and the defense without that revelation was entirely without information of it. And the revelation was made in a highly ethical manner which drew the express approval of defendant's trial counsel.

The Judgment of conviction should be affirmed.

BREITEL, J. P., RABIN, EAGER and WITTWER, JJ., concur.

Judgment of conviction unanimously affirmed.

APPENDIX XI

Opinion of Supreme Court, New York County, May 26, 1965, Denying Motion for New Trial

SUPREME COURT, NEW YORK COUNTY
SPECIAL AND TRIAL TERM, PART XXXVII

THE PEOPLE OF THE STATE OF NEW YORK

against

MARK FEIN, *Defendant.*
Indictment No.
760/64

CULKIN, J.:

The defendant was indicted for the crime of murder in the first degree on February 25, 1965 and after a trial by jury was convicted of murder in the second degree.

The defendant in an effort to obtain a second trial of the indictment made certain motions. The grounds set forth, which are many and varied, can roughly be divided into 4 categories:

1. Suppression of the evidence by the prosecution.
2. Newly discovered evidence.
3. Verdict against the weight of the evidence.
4. Miscellaneous arguments.

These groups will be treated in inverse order.

The defendant's contention that a chair was improperly introduced at the trial because it was previously illegally seized by the police is completely unsupported by the record. While counsel had objected to the introduction of this exhibit at the trial, there was no evidence adduced in support of an earlier conjecture of his that it might have been

unlawfully seized. Indeed, after the witnesses for the prosecution testified, defense did not seek a voir dire on the issue of the unlawful means of the seizure. The court found that said chair had been plainly abandoned by the defendant.

Defendant's contention that prejudicial newspaper publicity "influenced the jury" is a totally unwarranted charge. In fact, indications are exactly to the opposite, for at least one juror was exhaustively questioned by a representative for the defendant during the course of this trial motion and the defense announced its contention of speaking to other jurors on this very subject. Without examining the propriety of this (see People v. DeLucia, N.Y. 2d , 258 N.Y.S. 2d 377 [1965]) it is a fact that not one offer has been forthcoming which would tend to connect newspaper and magazine stories with the jury's deliberations. The defendant never sought a change of venue.

Defendant is in error when he contends that it should have been left for the jury to determine whether Mrs. Lazarus (Gloria Kendal) was an accomplice. A requested charge was refused because not one scintilla of evidence was adduced tending "to justify the inference that the offender has counseled or induced or encouraged the crime." (People v. Swersky, 216 N.Y. 471 [1916]). Defendant confuses "inference" with "speculation" when he points to certain inconsistencies in the testimony of witnesses for the prosecution and labels these as the basis for his conclusion that Mrs. Lazarus may have been an accomplice. The only reasonable conclusion that can be drawn from defendant's analysis of the evidence goes to the credibility of the witnesses in question, and was properly passed on

by the jury—it being entirely foreign to the issue of accomplice.

Defendant also argues that the verdict is against the weight of the evidence. There is no support for this assertion. The theory of the defendant rests upon the claims of inconsistent and contradictory bits of testimony heard at trial, the implausibility of the crime, and the incredibility of some of the witnesses, all of which were fully explored by his able counsel. Suffice it to say that neither the theory of the People's case nor the nature of the evidence was suspect as a matter of law. In fact, it is fair to observe that both the quality and the quantity of the proof submitted to the jury was unexceptional; it is not unlike that of countless other cases.

The defendant has tendered a variety of items that is labeled as newly discovered evidence. Despite the effort and ingenuity expended, it is clear that much of what is offered is not evidence at all. The remainder has already been passed upon by the jury. In addition, no explanation is offered as to why almost everything that is now adduced could not have been with diligence adduced before or during the trial. This ground alone would be conclusive in most instances.

A significant portion of defendant's offer rests on the affidavit submitted by Dr. Sidney Weinberg. Dr. Weinberg's testimony is offered in refutation of the People's alleged failure to explain the absence of the flow of blood from the deceased, the ability of two witnesses to lift a body-filled trunk over a retaining wall, and the duration during which the deceased would have remained submerged after being deposited in the river. Each of his conclusions

rests upon a statement of facts not supported by the record. The proof at trial did not show an absence of blood; on the contrary, a corner of a rug had been cut away and some time had elapsed before the first prosecution witness arrived on the scene. Opportunity was clearly present for the removal of any stains. What the record reflects is a lack of concern—or desire—by both counsel to elaborate on the subject before the jury.

Similarly, the defendant's suggestion that the trunk in question weighed fifty pounds is totally gratuitous. There is no justification for such a surmise and the mere fact that one was found by the defense in a lower Broadway store after the trial would not bar the prosecution from coming forward with one one-fifth that weight. However, each such offer would be equally impermissible. Moreover, not only were all of the pertinent facts before the jury, but no qualifications have been set forth as to Dr. Weinberg's special expertise in this highly conjectural area. Finally, the estimate that the deceased would have floated to the river surface within two weeks (the prosecution's case indicated four weeks), is based on the premise that the body was "otherwise free floating"; since this basis is not founded on fact, Dr. Weinberg's conclusion must necessarily fall.

Defendant's recovery of an electric switch box from the bed of the Harlem River some eighty feet from the point where the deceased had been thrown in, has no place in this proceeding. There is no showing that the object recovered was ever in the trunk, either during its transportation to the river wall or, indeed, in the defendant's apartment. The defendant insists such an association can be drawn because of affidavits he offers that conclude it is "consistent" with

known scientific principles that this switch box may have been submerged since October, 1963. He is in error; this is not a sufficient basis to have admitted the switch box in evidence during trial. Furthermore, there is no showing why these diving operations could not have taken place before trial. His failure to ascertain the site must be considered the result of his failure to inquire. His late claim, that he would have been given the wrong hour on which to base his diving calculations, is conjectural at best.

The defendant also proffers the names of present and past members of Mrs. Lazarus' family (Messrs. Barton, Schlessinger, Lazarus); the names of two men who rented the apartment adjoining his 63rd Street dwelling (Messrs. Vanderholm, Champion); and Hans Bruno Kahl, as all being worthy of both investigation and jury attention. The offer in this application is, of course, improper, as even the defendant seems to recognize for the latter three men are not tendered as the basis for a new proceeding—but an investigation, and the former three were all utilized by the defense during its cross-examination of prosecution witnesses at the trial. Moreover, the affidavits proffered on behalf of Messrs. Champion, Vanderholm and Kahl have been thoroughly discredited by the collapse of supportive statements and an inconsistent and inaccurate recount of chronology. Furthermore, rules of evidence would preclude Mr. Kahl's story, for, with all its other problems, it is merely hearsay.

Defendant also proffers newly discovered evidence of the location of the shots, absence of a witness from Mrs. Lazarus' apartment—contrary to trial testimony, uncovery of a phone call made by Mrs. Lazarus on the day of the

shooting, and further ballistic information, all of which he contends mandate a second trial. Since these are all intimately associated to his charge of prosecutorial suppression of evidence, they will be examined together. The defendant contends that he has evidence to show that two weapons were used to kill the deceased. But the entire structure of his arguments rests on evidence that was before the jury. Thus, the jury knew that one bullet was lighter than the three others, and that fragments from that bullet had lodged in the brain of the deceased. When the defendant's present expert concludes that two guns were used, he fails to take into account the evidence that was produced in conjunction with the autopsy and therefore rests his analysis on a distorted basis.

Similarly, when defendant's expert O'Gorman analyzes the testimony of Detective Haase and concludes that an inconsistency is present regarding the number of murder bullets on which lands and grooves are discernible (at one point he clearly indicates just one and at another implies all), that he is offering now what was open for cross-examination. Besides not agreeing with defendant's analysis of the testimony, its proffer is plainly untimely. The matter was before the jury.

When the defendant argues that the prosecutor suppressed a ballistics report prepared by Detectives Haase and Kelly, he is being unfair. Pursuant to his subpoena, those reports, and all others prepared by the police in this case, were in the court's possession during the trial. They were his to utilize as he saw fit; his choice having been made, he is bound by it. Moreover, his charge that the police reports contained material helpful to him is unfounded. There

was nothing in Detective Haase's report that was not explored in front of the jury and when Detective O'Brien testified to his microscopic observation of the "three minute fragments of metallic residue," he confirmed the reason why. Detective Kelly saw no pieces of bullet in the floor boards with his naked eye. When the defendant also argues that another court committed error in refusing a pre-trial motion for discovery and inspection of the bullets, he is raising an irrelevancy. He was never refused access to the bullets at trial; and he never contended that he lacked sufficient opportunity to examine them properly. I fail to see how the defendant was prejudiced.

The defendant offered the testimony of mother and daughter neighbors of his, Mrs. McNair and Mrs. Bennett, as proof that the shots came from a direction other than the defendant's 63rd Street apartment. Taking their credible testimony in the most favorable light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window (an exposure which faced the rear of the building as opposed to the defendant's dwelling which was in front and two floors higher) late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the "shots" because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with

her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk. Coupling the testimony of these witnesses with the information they gave to Mr. Dermody and Detective Leman (that the shots came from up above and towards the front of the building —and that Mr. Kassow had been so advised), the only reasonable conclusion is that they are completely confused. They misdated their conversation with Detective Leman by several months, failed to remember their description of the trunk from one week to the next, and as noted above inaccurately recounted the nature of the information they passed on to Mr. Kassow. That they may have told the prosecutor an entirely different story than what they presently recollect is so reasonable that it is the only probable explanation. The prosecutor, having been advised by the witnesses that the defendant's attorney had already been informed of matter which would tend to inculpate the defendant, could not be expected to come forward with the pointless task of repeating that information.

The defendant also proffered a Question and Answer from Sandra Ede which plainly states that she gave no instructions to Geri Boxer on October 10, 1963. It should be pointed out that if the prosecution had not consented to her testifying in court, a hearing was not warranted because the only indication that Miss Ede had so advised the District Attorney is the hearsay affidavit of defendant's counsel. Hearsay is clearly not a proper basis for a hearing on a motion for a new trial (*People* v. *Moore*, 29 Misc. 574, 579 [1899]; affd. 53 App. Div. 637 [1st Dept. 1900]; affd. 168 N.Y. 593). However, because of the prosecutor's willingness to explore the merits of Miss Ede's questions and an-

swers, she was permitted to testify (See *People* v. *Winkler*, 20 A D 2d 263, 265 [1st Dept. 1964]).

When Miss Ede provided and signed the questions and answers at the office of defendant's counsel she did so while being treated as an in-patient for mental illness at Jacoby Hospital—although on the advice and with the assistance of her doctor. In court she indicated, although with some ambiguity, that it was her practice not to speak to anyone over the intercom, and it is clearly this general procedure that she refers to in the questions and answers. But it is equally certain that this witness, who was execptionally anxious not to be a witness—either at the trial or at the hearing—consistently advised all of the representatives of the prosecution repeatedly she could not recolleet "one way or the other" the events of October 10, 1963, or any other day during that period, with respect to her participation in a conversation over the intercome with Geri Boxer. Faced with a witness of now proven instability whom he had every reason to believe was withholding information helpful to his case, the prosecutor acted appropriately when he advised the defense of her name and address. He was under no obligation to volunteer her entire story and defendant's prayer for that proposition is rejected as unprecedented. It is also considered significant that the defendant was not only aware of Miss Ede, but interrogated Miss Boxer at the trial as to whether Miss Ede did not have a different recollection than Miss Boxer's. Miss Ede herself supports Miss Boxer's answer which was "she said she didn't remember." It is further certain that the statement by defendant's attorney concerning the inaccessibility of Miss Ede at the

time her name was tendered by Mr. Dermody at trial are inaccurate. She was avaliable as a witness past the time the defense rested, and the conclusion that the defense consciously rejected the idea of speaking with her is irresistible and is supported by their refusal to obtain an affidavit from Mr. Kleinman on this subject, in spite of this court's express request. Similarly, it is plain that the defendant charges that the prosecution harassed Miss Ede until she was driven to a mental institution is without one scintilla of proof. Miss Ede denied ever making such a charge.

The defendant proffers Dagmar Finch Generazio as basis for a new trial. Her story is that Mrs. Lazarus telephoned to borrow a car to move a box; she fixes the time as between 3 and 4 P.M. on October 10, 1963. Having seen and heard this witness, I reject her testimony as totally unworthy of belief. While under oath at the hearing, she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gail Weiner Tracy, a witness called by the prosecution after she submitted a sworn question and answer on behalf of the defendant, upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon, I further findd that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief. I find that she never advised the prosecution of

identifying a picture of the deceased, and when coupled with her equivocal testimony on the subject I find that she was never able to so identify it.

Sargent Russell Generazio, the estranged husband of Dagmar, testified to certain conversations had with representatives of the prosecution which corroborated his wife's story in most of the material aspects. The witness, who frankly admitted a consuming interest in winning anew his wife's affections, continuously expressed by word and deed his desire to ingratiate himself in her favor during the several days the two were in court. Viewed most charitably, his testimony does not realize the level of probity required.

A more troublesome issue arises upon Detective Leman's and Assistant District Attorney Dermody's candid admissions that Mrs. Generazio told them of receiving a call sometime in late September or early October, 1963, near or after 7 P.M. Since this court finds Mrs. Generazio unworthy of belief, it is understandable that the prosecution did. Faced with a story of doubtful relevance and a witness who was sufficiently unmindful of the truth that in her desire to become a participant in the trial, that she altered the facts as she believed would be helpful to the prosecution, Mr. Dermody called in the only person who could bear light on the issue. She, Mrs. Tracy, flatly denied the receipt of any such call at any time. Coupling this with Mr. Dermody's accurate knowledge that the defense was aware of both Mrs. Generazio and the story she related, as corroborated by the reference to her by the defense during cross-examina-

tion and Mr. Whelan at the hearing, no improper conduct can be established. In sum, I hold that a new trial is not required by the People's failure to turn over the name of this particular witness to the defense. The defense did not show sufficient diligence in seeking the whereabouts of this witness; her story was not helpful to the defense; and in any event, this witness is so unworthy of belief that further proceedings before a jury are not in order.

In connection with this phase, the defendant contends that the prosecutor was misleading when, at the trial, he objected to a defense question put to Mrs. Lazarus concerning phone calls she made and based his objection on the ground that only one call was made. This comment is taken out of context, for it is clear that the objection was founded only on the basis of improper foundation. Defendant's attorney was assuming a fact in his question that had not been received in evidence, or an inquiry made.

The argument is advanced that failure to disclose Gloria's confrontation by Dagmar was in fact depriving the defendant of a fair trial; that such information would have been invaluable on cross-examination.

As to any further attack on Gloria's credibility, suffice it to say that her character and reputation never were an issue. The defense interrogated her as to every misdeed, and every alleged act of deviation from moral principles. The People made no effort by way of mitigation—an orphan, a product of Westfield State Farm, committed at an extremely tender age, a product of State rehabilitation—but in fact characterized her in summation as an "old whore."

Appendix XI

If anyone was misled in this case it was the police, the District Attorney and Mr. Blinder, counsel for the defendant. In his sworn testimony before the jury, he stated that just a few hours before a scheduled meeting at his office with police officials concerning an official investigation concerning the defendant, he was introduced to one Gloria Kendall. He stated he did not know she and Margaret Foster were one and the same person, Margaret Foster being the person whom the police were seeking in relation to the 63rd Street apartment.

The final witness to testify was Gail Weiner Tracy. Her story does not withstand analysis. Her testimony is that although she insisted without variation for months on end that no call had come to her apartment despite the most persistent efforts of the prosecutor, a two hour conference with the defendant's attorney brought forth the vivid recollection and admission of the hour and date of such a call. Subsequently on the very day she allegedly offered this assistance to the defendant, she called the District Attorney's office and advised that the defense had tried to buy her off since her observations were harmful to their cause. Thereafter she left her home for some days in an effort to avoid process. But without detailing the unwholesome taste Mrs. Tracy's narration leaves concerning all of the circumstances immediately preceding her appearance in court, I find that on the basis of her entire testimony she is not worthy of belief. Indeed, one glaring and unexplained contradiction is her statement in the question and answer that she fixed the time of the call as shortly after 3 P.M. because she had just taken her Dilantin and Phelantin pills, and her

statement at the hearing that she took these pills only at 9 A.M. and 9 P.M. At 3 P.M. she used the Dilantin pill alone —her unvarying practice for thirteen years. If she had just taken the two pills she claims in the question and answer, the hour was obviously no where near 3 P.M. In any event, the fact that she could pinpoint the date and hour of a phone call 18 months ago with such accuracy, but remains unable to fix the day of a meeting with an attorney for the defendant the very week of the hearing indicates the want of credibility attaching to her.

The motion is therefore in all respects DENIED.

/s/ GERALD P. CULKIN
J.S.C.

GERALD P. CULKIN

Dated: May 26th, 1965.

APPENDIX XII

Materials Relating to Blue Ribbon Juries

Excerpts from 1952 Report and Study of the Judicial Council of the State of New York *

From Report (pp. 58-59):

The Judicial Council has sought to improve the general jury system to such an extent that extraordinary juries would no longer be necessary. The Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in any type of case. In large part the Council's recommendations for the improvement of general juries have been adopted; thus women are now eligible to serve, exemptions have been limited and general jurors must meet the standards formerly required only of special jurors. So, too, the Council's recommendations for the abolition of extraordinary juries have been adopted by eliminating foreign and struck juries (see Third New York Judicial Council Report 34, 121-128 (1937); Fourth *id.* 20 (1938)). However, despite the improvement of the general jury system, special juries are still retained in four counties.

In 1937, the Judicial Council first recommended the abolition of special juries in the counties in which they then existed on the grounds that they were unjust and unnecessary (Third New York Judicial Council Report 34, 121-128 (1937)). This recommendation has been renewed periodically (see particularly, Fourth New York Judicial Council Report 46-48 (1938), Eighth *id.* 39-41 (1942)). In 1941

* Footnotes omitted.

special juries were abolished in Westchester and Nassau Counties upon the recommendation of the officials of those counties (Eighth New York Judicial Council Report 24, 39 (1942)). Consequently special juries are now authorized only in New York, Bronx, Kings and Queens Counties.

During the past few years, two cases were decided by the Supreme Court of the United States which upheld the constitutionality of the special jury. Both were five to four decisions. In view of these cases and the fact that it is more than a decade since the Council has collated and presented fact on this subject, the Council conducted a survey for the purpose of re-evaluating its past recommendations in the light of presently existing facts. The survey is contained in this Report in Supporting Study (A) 153 to 171, *infra*.

The Council reasserts its belief that the basic concept of a special jury is repugnant to the traditional right of a person to be tried by a jury of his peers (Fifth New York Judicial Council Report 42 (1939)). In any event, the lack of necessity for the special jury and the fact that there are no truly objective standards for the selection of special jurors justify the abolition of special juries.

On the basis of the facts brought out in the survey and upon re-consideration the Council renews its recommendation that special or so-called "blue ribbon" juries for counties having a population of one million or more, under the sole provisions now left for permitting special juries and applicable only to the counties of New York, Bronx, Kings and Queens, be abolished.

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From Study (pp. 157-159):

In its Third Annual Report in 1937, the Judicial Council recommended the abolition of special juries. This recommendation has been consistently renewed since that time.

The Council's approach to the problem is indicated by the following excerpts from the Council's Fourth Annual Report to the Legislature in 1938 (pages 46-47):

> "The Judicial Council has been attempting to improve the general jury system to such a point that extraordinary juries of any kind will no longer be necessary. To this end, the Council recommended women jurors, limitations on jury exemptions, and the abolition of struck, foreign and special juries, all of which recommendations were put into effect, except the abolition of special juries. . . .
>
> "The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases."

Improvement in the quality of jurors on the general panel has long since been accomplished by applying to all jurors the standards which formerly were required only of special jurors, with the result that the general panel now represents a true cross section of the community.

In 1941, provisions of the statute which had permitted the use of special juries in Nassau and Westchester Coun-

ties, where, however, such juries had not been utilized, were eliminated.

In 1947 and 1948, the cases of *Fay* v. *New York* and *Moore* v. *New York,* in which the Supreme Court of the United States by five to four decisions upheld the constitutionality of the special jury law as it was then shown to have functioned by the evidence in those two cases, suggested that a re-appraisal of the application of standards under the law on a current basis might have changed the result.

In view of the above developments together with the fact that it is now more than a decade since the facts showing the operation of the special jury system were collected and presented by the Council, the Council has made this survey and re-evaluation of the subject covering the judicial years 1941 through 1950.

As a result, the Judicial Council renews its recommendation that special or so-called "blue ribbon" juries for counties having a population of one million or more, under the sole provision now left permitting special juries and applicable only to the counties of New York, Bronx, Kings and Queens, be abolished.

Conclusions that follow from the Council's survey are:

A: With respect to the use of the special jury, the special jury provisions apply only to New York, Bronx, Kings and Queens Counties. However, the special jury is used only in New York, Bronx and Kings Counties.

In New York, Bronx and Kings Counties the special jury is used:

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1. Almost exclusively in the trial of murder first degree prosecutions;

2. Almost exclusively upon request made by the district attorney.

B. Comparison between the composition of the special jury and general jury panels in the four counties where it may be used shows:

1. The special jury is no longer needed because the general jury system is producing a fair cross section of the community capable of determining any case.

2. There are no objective statutory qualifications by which the selection of special jurors may be differentiated from those selected for the general jury panel.

3. The special jury panel is a less fair cross section of the community than the general jury panel because of greater imbalance as to:

(a) occupation, there being a disproprotionate weighting in favor of "business" people as opposed to "working" people;

(b) educational qualifications;

(c) sex, there being a smaller proportion of women to men on the special jury panel than on the general jury panel.

While there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed

that a banker is more "prejudiced" against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated, the special jury does not measure up to the theory that a jury should represent a fair cross section of the community.

Even though murder trials are in some respects more "important" than others, there does not seem to be any factual basis for the assumption that they are more difficult of proof or more complex or require more understanding or ability on the part of the jurors than many other types of cases. Nor can it be seriously argued that murder trials in counties of more than one million population are more intricate or difficult of comprehension than in counties of less than one million.

Trying one indicted for murder in Kings County by a special jury, aside from any question of constitutionality, but trying those similarly indicted in nearby Nassau County by a general jury does not readily appeal to reason or sound public policy.

The wisdom of sending men to the electric chair on their conviction by a jury selected under a system which four justices of the Supreme Court of the United States have condemned as unconstitutional on weaker evidence of its defects than is here presented is questionable. Especially is this true when there is a constitutional system already in existence, the merit of which is publicly testified to by judges in our courts who are in daily contact with it.

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From Study (pp. 165-166):

B. Occupation

As the defendants in the *Fay* case attempted to prove, the most significant difference between the special and general panel is occupational.

A comparison shows that those generally assumed to rate higher in the economic structure predominate on the special panel, while the general panel more nearly represents a cross section of the community. Thus, those who may be called business people (executives, insurance men, real estate men, advertising men, manufacturers, bankers, dealers in securities, accountants, auditors, and buyers) constitute a large portion of the special panel: 47% in New York County, 43% in Bronx County, 45% in Kings County and 39% in Queens County, while they make up a much smaller portion of the general panel, 23% in New York County, 24% in Bronx County, 16% in Kings County and 15% in Queens County.

On the other hand, those who may be called working people (electricians, chaffeurs, drivers, personal servants, service and repairmen, labor union representatives, bookkeepers, miscellaneous skilled and unskilled laborers, superintendents of buildings, secretaries and stenographers, and clerk) constitute a larger portion of the general panel than they do of the special panel.

The tables indicate that the special jury lists contain the following percentages of such groups: 7% in New York, 25% in Bronx, 17% in Kings and 18% in Queens, while the general panel contains 17% in New York, 36% in Bronx, 40% in Kings and 45% in Queens in the groups mentioned.

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The occupational tables indicate variations in stress from county to county. However, the trend is the same in all counties.

C. Education

The educational level on both panels varies considerably from county to county but in each county the educational level of the special panel is higher than that of the general panel. The difference between the two panels is greatest in Queens County and least in Bronx County.

Thus, the percentage of special jurors who had gone at least part way through college was 60% in New York, 21% in Bronx, 43% in Kings, and 43% in Queens, while of the general list only 41% in New York, 17% in Bronx, 20% in Kings, and 12% in Queens had done so.

Conversely, those on the special jury list who had not gone beyond primary school constituted only 5% in New York, 21% in Bronx, 5% in Kings and 4% in Queens, while on the general list the percentages were 13% in New York, 22% in Bronx, 25% in Kings and 34% in Queens.

Those on the special list who had completed high school made up 25% in New York, 33% in Bronx, 26% in Kings and 27% in Queens. On the other hand, high school graduates constituted 32% in New York, 34% in Bronx, 24% in Kings and 26% in Queens of the general list.

The educational figures indicate that the selecting officials place much greater stress on formal education in Queens County than they do in Bronx County and that New York and Kings Counties fall between the two.

A glance at the occupational table is in order in regard to education. It indicates that certain groups usually as-

sumed to have high educational and intelligence levels are rarely selected for the special list. Thus, the number of the educators, teachers, librarians, college students and social workers on the special list is nineteen in New York, none in Kings and four in Queens. The general panel indicates ninety-six in New York, thirty in Kings and five in Queens. In Bronx County the trend is seven to four the other way.

D. Sex

The percentage of women on both panels varies considerably from county to county, perhaps indicating that in some counties the selecting officials make less effort to obtain women who are willing to serve.

Women on the special panel comprise 2% in New York, 10% in Bronx, less than 1% in Kings, and 11% in Queens. On the general panel women constitute 11% in New York, 22% in Bronx, 6% in Kings and 7% in Queens.

Excerpt from April 26, 1965 Report of the Committee on Criminal Courts, Association of the Bar of the City of New York

Present law provides that the county clerk of each county having a population of a million or more (i.e., New York, Kings, Queens and Bronx Counties) is required to select from among the persons qualified to serve as trial jurors in that county a certain number of special jurors. The selection is made after each prospective special juror has been personally examined as to his qualifications by the county clerk or his designated subordinate. Certain

standards must be met but it is the county clerk or his subordinate who determines whether the person examined should become a special juror. If the juror is rejected, it is often impossible to determine whether the rejection was based upon his failure to meet the statutory qualifications or upon h[redacted] failure to meet some subjective criteria which may have [redacted] applied by the examiner.

* * *

The [redacted]ttee favors the abolition of the special jury for two reasons. First, it is of doubtful constitutionality. The United States Supreme Court upheld the special jury against constitutional attack by the barest of majorities in *Fay* v. *New York*, 332 U.S. 261 (1947) and *Moore* v. *New York*, 333 U.S. 565 (1948). In those cases, however, the majority held no more than that the evidence presented as to the allegedly unfair operation of the special jury system did not warrant a finding that either the right to due process or the right to equal protection of the laws had been violated. Sufficient evidence may now be available. See, for example, the Recommendation and Survey Relating to the Abolition of Special Juries, published in the 18th Annual Report and Studies of the Judicial Council of the State of New York (1952). The special jury may not survive another such attack upon its constitutionality.

Second, if the superior quality of the special jury was ever necessary to the proper administration of criminal justice, it is no longer so, since—as would be attested to by most New York prosecutors—the quality of the regular jury panel has considerably improved by virtue of the raising of the standards by which it is selected, as well as

through the general educational increase in the population as a whole.

In sum, since the special jury is an unnecessary institution of dubious constitutionality, it should be abolished. The abolition should extend to all cases, not merely those where the death penalty may be imposed.

APPENDIX XIII

Former Section 749-aa of the New York Judiciary Law*

§749-aa. SPECIAL JURORS IN CERTAIN COUNTIES

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found

* This is the text of Section 749-aa (being also known as Article 18-B of the New York Judiciary Law) as it was in effect at the time of appellant's indictment and trial. Subsequently, Section 749-aa was repealed in its entirety by New York Laws 1965, c. 778, §3, effective September 1, 1965.

guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty of the crimes charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy, secretary, or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, as to his qualification and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before

him, his deputy, secretary or any other employee of the county clerk's office duly authorized by the county clerk and approved by the presiding justice of the appellate division, at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person so subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. A subpoena issued under this section shall be regulated by the civil practice law and rules, except that no fees are required to be paid to any person so subpoenaed. The record of the jurors selected as such special jurors, shall contain the age of each special juror so selected, his business or vocation, if any, the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action, or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be

tried. It must be made upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be en-

titled in the action in which the jury is to serve specifying the term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the atendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6. Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the

time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors, either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept and certified as prescribed for the original drawing and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issues must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore complied, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

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9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of his section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Duties of commissioner of jurors in certain counties. In the event that the office of commissioner of jurors has been established in a county to which the provisions of this section are applicable, all of the powers and duties conferred or imposed upon the county clerk by this section are transferred to and shall hereafter be exercised and performed by the commissioner of jurors of such county.

11. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law.

Section 813-d3 of the New York Code of Criminal Procedure

[Relating to Motions for Suppression of Evidence Alleged to have been Obtained as a Result of Unlawful Search and Seizure]

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses, the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.